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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act directs the Secretary of the Interior to *restore* listed species to their original population by converting resources authorized under various reclamation statutes, thus repealing by implication those statutes, where the congressional will expressed in the reclamation statutes and in the Endangered Species Act can be simultaneously accommodated in a way that will not *jeopardize* any endangered or threatened species.

2. Whether the Washoe Project Act and related federal reclamation laws obligate the Secretary of the Interior to obtain reimbursement for any Stampede Dam waters not required to avoid jeopardizing the endangered and threatened species in Pyramid Lake.

LIST OF PARTIES *

Petitioners, plaintiffs-appellants in the United States Court of Appeals for the Ninth Circuit, are the State of Nevada, the Carson-Truckee Water Conservancy District and the Sierra Pacific Power Company. Respondents, defendants-appellees in the Ninth Circuit, are the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Regional Director, Mid-Pacific Region, Bureau of Reclamation. The defendant-intervenor-appellee in the Ninth Circuit was the Pyramid Lake Paiute Tribe of Indians, also a respondent before this Court.

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* Pursuant to Rules 21.1(b) and 28.1 of this Court, petitioners inform the Court that Sierra Pacific Power Company is a subsidiary of Sierra Pacific Resources, which has two additional subsidiaries—Lands of Sierra, Inc., and Sierra Energy Company. Valmy 2 Construction Company is the subsidiary of Sierra Pacific Power Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	3
ARGUMENT	8
1. The Endangered Species Act Does Not Compel the Secretary to Ignore His Duties Under Pre-Existing Statutes Where the Endangered Species Act and the Pre-Existing Statutes Can Be Simultaneously Accommodated	8
2. Federal Reclamation Laws Require the Secretary to Obtain Reimbursement for Stampede Dam Waters Not Needed to Meet His Obligations Under the Endangered Species Act	20
CONCLUSION	24
APPENDIX	
APPENDIX A—Decision of United States Court of Appeals for the Ninth Circuit, in *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984), decided August 22, 1984	1a
APPENDIX B—Memorandum Decision of Hon. Harry E. Claiborne, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Andrus*, Civ. No. R-76-152-HEC, entered August 27, 1979	11a

TABLE OF CONTENTS—Continued

Page

APPENDIX C—Decision of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982), decided February 16, 1982 ..... 23a

APPENDIX D—Decision of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982), decided October 4, 1982 ..... 37a

APPENDIX E—Judgment of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 GJS, entered on October 27, 1982 ..... 55a

APPENDIX F—Defendant's Motion to Amend Judgment in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 BRT, made on November 5, 1982 ..... 57a

APPENDIX G—Defendant's Memorandum in Support of Motion to Amend Judgment in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 BRT, submitted on November 5, 1982 ..... 59a

APPENDIX H—Order of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 GJS, entered on December 27, 1982 ..... 62a

APPENDIX I—Endangered Species Act of 1973, 87 Stat. 884, as amended, 16 U.S.C. §§ 1531 *et seq.* 64a

APPENDIX J—Washoe Project Act of 1956, 70 Stat. 775, as amended, 43 U.S.C. §§ 614-614d.... 145a

APPENDIX K—Projects Not Requiring Repayment Contracts Prior to Construction 150a

TABLE OF AUTHORITIES

Cases Page

Carson-Truckee Water Conservancy District v. *Clark*, 741 F.2d 257 (9th Cir. 1984) 1, 7, 10, 21, 23
Carson-Truckee Water Conservancy District v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982) 1, 6-7, 20-21
Carson-Truckee Water Conservancy District v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982) 1, 7
Carson-Truckee Water Conservancy District v. *Watt*, 575 F. Supp. 467 (D. Nev. 1983) 1
Connor v. *Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978) 19
Defenders of Wildlife v. *Andrus*, 428 F. Supp. 167 (D.D.C. 1977) 19
Morton v. *Mancari*, 417 U.S. 535 (1974) 12
National Audubon Society v. *Watt*, 678 F.2d 299 (D.C. Cir. 1982) 10
National Wildlife Federation v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) 17-19
Nevada v. *United States*, 103 S. Ct. 2906 (1983) 7
North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 19
Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 21
Roosevelt Campobello Int'l Park Comm'n v. *Environmental Protection Agency*, 684 F.2d 1041 (1st Cir. 1982) 19
Sierra Club v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976) 19
Swigart v. *Baker*, 229 U.S. 187 (1913) 22
TVA v. *Hill*, 437 U.S. 153 (1978) 8, 11-13, 18, 20
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 21

Statutes

5 U.S.C. § 702 6
5 U.S.C. § 704 6
5 U.S.C. § 706 6
16 U.S.C. §§ 528-529 18
16 U.S.C. §§ 1531 *et seq.* 2, 6, 12-18, 20

TABLE OF AUTHORITIES—Continued

	Page
23 U.S.C. §§ 101 *et seq.*	17
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	6
28 U.S.C. § 1337	6
28 U.S.C. § 1361	6
43 U.S.C. § 485h(a)	2-3, 22
43 U.S.C. §§ 614-614d	2-3, 6-8, 11-13, 19-23
Reclamation Act of 1902, ch. 1093, 32 Stat. 388	21, 23-24

Miscellaneous

102 Cong. Rec. 7040, 12,229 & 13,939 (1956)	23
119 Cong. Rec. 42,913 (1973)	16
32 Fed. Reg. 4001 (1967)	4
40 Fed. Reg. 29,863 (1975)	4
49 Fed. Reg. 28,583 (1984)	14
49 Fed. Reg. 30,801 (1984)	14
49 Fed. Reg. 39,099 (1984)	14
Fish and Wildlife Service, U.S. Dep't of Interior, Narrows Unit Biological Opinion—Whooping Crane (Jan. 20, 1983)	15
Peterson, *Plan to Put Logging Roads in Wild Areas Is Challenged, N.Y. Times*, Oct. 31, 1984	18
Wash. Post, Oct. 30, 1984	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Memorandum Decision of the United States District Court for the District of Nevada, dated August 27, 1979, is not reported but is printed as Appendix B hereto. The opinions of the District Court dated February 16, 1982, and October 4, 1982, are reported at 537 F. Supp. 106 and 549 F. Supp. 704 and are printed as Appendices C and D hereto.[1] The decision of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought, dated August 22, 1984, affirming in part and vacating in part the decisions of the District Court, is reported at 741 F.2d 257 and appears as Appendix A hereto.

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[1] The District Court also entered an opinion, not at issue here, dated September 9, 1983, and appearing at 575 F. Supp. 467, which held that the Pyramid Lake Paiute Tribe of Indians (the "Tribe") is not entitled to costs and attorney fees.

JURISDICTION

The Court of Appeals' decision in the case at bar was rendered on August 22, 1984 (App. 1a), affirming in part and vacating in part the decisions of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Petitioners rely on the Endangered Species Act, 87 Stat. 884, as amended, 16 U.S.C. §§ 1531 *et seq.*, and the Washoe Project Act of 1956, 70 Stat. 775, as amended, 43 U.S.C. §§ 614-614d, which are reprinted as Appendices I and J hereto. Petitioners also rely upon the Reclamation Project Act of 1939. 43 U.S.C. § 485h(a):

> (a) Findings of Secretary
>
> No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—
>
> (1) the engineering feasibility of the proposed construction;
>
> (2) the estimated cost of the proposed construction;
>
> (3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;
>
> (4) the part of the estimated cost which can properly be allocated to power and probably be returned to the United States in net power revenues;
>
> (5) the part of the estimated cost which can properly be allocated to municipal water supply

or other miscellaneous purposes and probably be returned to the United States.

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary. If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefore has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved.

STATEMENT OF THE CASE

The Truckee River and its tributaries are the principal source of water for the cities of Reno and Sparks, Nevada, and surrounding areas. Because the annual precipitation in this region can vary substantially from year to year, the Reno Sparks area experiences periodic dry cycles when, at times, there is no water in the Truckee to satisfy the bulk of the water rights held for the area's water supply. The solution to this recurrent problem is to build reservoirs to store water from wet years for use during dry years.

Recognizing the need to secure a reliable and adequate water supply for use in western Nevada during the periodic dry cycles, Congress enacted the Washoe Project Act, 70 Stat. 775, 43 U.S.C. §§ 614-614d, App. 145a, in 1956. That Act authorized the construction of Stampede

Dam and Reservoir ("Stampede") on the Little Truckee River, a tributary which enters the Truckee in California. The water stored in Stampede was intended by Congress and the sponsors of the Act to be used mainly for reimbursable purposes such as irrigation, power generation, and municipal, industrial and domestic ("M&I") water supply. Such uses are called reimbursable in reclamation law because the users must enter into repayment contracts with the Bureau of Reclamation to repay the Reclamation Fund their share of the construction, operation, and maintenance costs of the Project. The Carson-Truckee Water Conservancy District (the "District"), a petitioner herein, was organized under state law in 1958 for the express purpose of buying Stampede water. The District negotiated a repayment contract with the Bureau of Reclamation, but it has never become final because the Secretary has refused to execute it.

Construction of Stampede was started in 1966 and completed in 1970. Since then, the Secretary has refused to sell any of Stampede's water. Instead, he has released that water in the spring in order to restore two species of fish that are found in Pyramid Lake, at the terminus of the Truckee River. The cui-ui is a sucker fish that was listed as endangered in 1967. It is found only in Pyramid Lake. 32 Fed. Reg. 4001 (1967). The Lahontan cutthroat trout, which is found in more than 50 rivers, streams and lakes in Nevada, California, Utah and Washington, was originally listed as endangered, but was upgraded to threatened status in 1975. 40 Fed. Reg. 29,863 (1975).

Pyramid Lake's population of these species declined between 1915 and 1940 because the spawning runs were blocked. The blockage was partly due to a delta that was formed at the mouth of the Truckee from the refuse of upstream sawmills. The situation was exacerbated by the diversion of a large portion of the flow of the Truckee to the Newlands Reclamation Project in the Carson River basin and by the prolonged drought of the 1920's and

1930's. Unable to spawn, the Lahontan cutthroat trout disappeared from the Lake. The cui-ui population declined, but the species was able to survive by spawning in the delta and in other creeks tributary to Pyramid Lake.

Since the 1950's, however, there have been several significant improvements for the fish. First, the Truckee-Carson Irrigation District has cut back its diversions from the Truckee River. Most significantly, it no longer diverts water for single-purpose hydroelectric power. Second, the Secretary has constructed several major facilities designed to improve spawning, including the Pyramid Lake Fishway, which was designed to allow fish to migrate past the delta, and Marble Bluff Dam, which regulates water flows down the Fishway. Additionally, the Secretary built a fish-trapping facility, a Lahontan cutthroat trout hatchery at Marble Bluff, and another fish ladder several miles upstream. Fourth, a cui-ui hatchery has been established on the Pyramid Lake Paiute Indian Reservation, and in the past ten years more than 12 million cui-ui have been planted in Pyramid Lake. Through these facilities, the cui-ui spawning runs are being revitalized. Pyramid Lake has been restocked with Lahontan cutthroat trout, and millions of fry have been raised at hatcheries and released in Pyramid Lake.

In the late 1970's, the Secretary prepared the Cui-ui Recovery Plan, which was approved by the Fish and Wildlife Service in 1978. The Plan recommends that the Secretary take actions to restore the shade canopy along the lower Truckee, to improve the river channel, and to transplant the cui-ui. Lowering the water temperature through the use of the shade canopy would reduce the volume of flows that would be released by the Secretary. Channel modification would also reduce water temperatures and provide migrating fish with deep pools in which to rest during the hotter part of the day. Transplantation of the cui-ui would strengthen the cui-ui's long-

term chance for survival. The Cui-ui Recovery Team has estimated the cost of these restorative measures at $605,000.

None of these recommendations has ever been adopted or implemented by the Secretary. Instead, the Secretary has converted Stampede, a reclamation project reservoir, into a recovery program for the cui-ui and Lahontan cutthroat trout. Rather than plant shade trees along the Truckee's banks, the Secretary has released up to six times the normal river flow to reduce water temperatures at Marble Bluff, 75 miles downstream.

The Secretary has not consulted the Fish and Wildlife Service, as required by Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to determine how much water could be sold from Stampede without jeopardizing the continued existence of the cui-ui and Lahontan cutthroat trout. Instead, he has operated Stampede solely for the promotion of these species to the exclusion of the other purposes underlying the Washoe Project Act.

The District, Sierra Pacific Power Company, and the State of Nevada filed their Complaint in the instant action in the United States District Court for the District of Nevada in August 1976 and subsequently amended their Complaint in October 1976. The Plaintiffs' Amended Complaint sought declaratory relief, mandamus, and an order compelling the Secretary to sell a portion of Stampede's water to the District for M&I purposes and requiring him to obtain a water permit from the Nevada State engineer. The Tribe intervened as a defendant in late 1976. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. §§ 702, 704, and 706.

The District Court bifurcated the issues in the case. In its first opinion, *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982) (*"Carson-Truckee I"*) (App. 23a), the court held that (1) petitioners had standing to challenge the Secretary's

refusal to sell water for reimbursable purposes; (2) petitioners had a private right of action under the reclamation laws; (3) the Secretary was obligated to sell any excess Stampede water after fulfilling his obligations under the Endangered Species Act and the Tribe's reserved water rights; and (4) no Nevada permit was required for Stampede's current operations. App. 36a.

In its second decision, *Carson-Truckee Water Conservancy District* v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982) (*"Carson-Truckee II"*) (App. 37a), the court ruled that under the Endangered Species Act "the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and Lahontan cutthroat trout are no longer classified as endangered or threatened." App. 46a.

On appeal, the Ninth Circuit Court of Appeals affirmed in part and vacated in part the District Court's rulings. *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984); App. 1a. The Court of Appeals vacated the lower court's ruling in *Carson-Truckee I* that the Washoe Project Act requires the Secretary to sell all water from Stampede after fulfilling his obligations under the Endangered Species Act and the Tribe's reserved water rights.[2] App. 5a. The court construed the Washoe Project Act as merely prohibiting the Secretary from delivering project water for reimbursable purposes without first obtaining a repayment contract. The Act, according to the court, imposes no affirmative obligation to sell the Stampede waters. App. 5a. The Ninth Circuit affirmed the District Court's ruling in *Carson-Truckee II* that the Endangered Species Act required the Secretary to give priority to the fish over all other purposes of the Washoe Project Act until such time as the cui-ui and Lahontan cutthroat trout are no

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[2] The question of the Tribe's claimed reserved water rights was not reached by the lower courts and thus is not an issue in this case. Those rights were ultimately determined by this Court in *Nevada* v. *United States*, 103 S.Ct. 2906 (1983).

longer listed as endangered or threatened with extinction. App. 8a.

ARGUMENT

The Ninth Circuit in this case required the Secretary of the Interior to use all projects under his jurisdiction for the exclusive purpose of restoring the endangered and threatened species to their historical population levels. Nothing in the Endangered Species Act, its legislative history, or this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), justified such a sweeping holding, which commanded the Secretary to ignore totally the congressional mandate of the Washoe Project Act and, by inference, all other reclamation acts with similar provisions. Because the dangerous implications of the Ninth Circuit's reasoning extend far beyond the factual scenario of the instant case, the writ of certiorari should be granted and the Court of Appeals' decision reversed.

1. The Endangered Species Act Does Not Compel the Secretary To Ignore His Duties Under Pre-Existing Statutes Where The Endangered Species Act And The Pre-Existing Statutes Can Be Simultaneously Accommodated.

The Ninth Circuit ruled that the Secretary has an affirmative duty under the Endangered Species Act to restore the Pyramid Lake fish to the point where they no longer merit protection, even if this requires the Secretary to use all of the water not only from Stampede but, presumably, from all other reclamation projects in the area. According to the Court of Appeals, the command of the Endangered Species Act is mandatory, and it is not merely to insure that the Secretary's operation of Stampede does not jeopardize the cui-ui and Lahontan cutthroat trout but rather to restore them at the expense of the primary purpose of the Washoe Project Act. In effect, the Ninth Circuit ruled that Congress repealed the Washoe Project Act by implication when it enacted the Endangered Species Act.

The method by which the Court of Appeals reached its conclusion required a convoluted reading of the Endangered Species Act. The court relied upon four sections of the Act: Sections 2(b) and (c), 3(3) and 7(a)(1). Essentially, Sections 2(b) and (c) recite that the Act provides a means for conserving ecosystems and a program for conserving listed species—end results that all federal agencies should "seek" to accomplish. Section 7(a)(1) provides that the Secretary and all federal agencies shall "utilize their authorities in furtherance of the purposes of this chapter." These general provisions clearly do not require the drastic result reached below. However, the Ninth Circuit then turned to the definitional portion of the Act, Section 3(3), which defines "conserve" and its derivatives in terms of using all methods and procedures "which are necessary" to bring endangered and threatened species "to the point at which the measures provided pursuant to this chapter are no longer necessary."

In other words, the Court of Appeals reasoned that the definition of "conserve" requires that all steps be taken so that the Act's "measures" are no longer necessary, which the court thought was tantamount to requiring that all endangered and threatened species be restored to historic levels. And because the Secretary is directed to use his authority to "conserve," this means that for the indefinite future he must take whatever steps are necessary not just to preserve these species but to bring them back to their original condition, no matter how far in the past that condition may have existed and no matter how his steps may directly conflict with other congressional mandates. This stringing together of assumptions from various parts of a statute, with ultimate authority resting upon a one-sentence definition of one word, is a strange and tortured way to repeal by implication a line of reclamation statutes stretching back over 80 years. Additionally, it totally fails to take into account the ameliorative language of Section 7(a)(2),

which speaks not of restoring or rehabilitating a species but of not jeopardizing its continued existence.

A more logical reading of the statute--one that would construe the Endangered Species Act so as not to repeal reclamation laws enacted both before and after that Act—is that the Secretary must not do anything to jeopardize or destroy any listed species but that he cannot use a project authorized for reclamation purposes to rehabilitate such a species in the face of countervailing congressional directives contained in the reclamation statute. Thus, in this case the Secretary must first insure, through the consultation process outlined in Section 7 of the Endangered Species Act, that his operation of Stampede will not be likely to jeopardize the continued existence of the listed species in Pyramid Lake. The consultation process may reveal that a certain level of water flow is necessary to avoid jeopardizing the fish.[3] But after this original goal is fulfilled, the Secretary must use the remaining water as Congress has otherwise directed—in this instance, to obtain reimbursement for the outlays Congress approved for the Washoe Project.[4]

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[3] The Court of Appeals affirmed the District Court's holding that petitioners' proposed alternative plan would jeopardize the fish and that the Secretary had not abused his discretion in rejecting that plan. App. 10a. The point of petitioners' alternative plan was merely to illustrate one way in which the competing water needs could be reconciled. It does not follow from the lower court's holding that there is no reasonable and prudent alternative to using all the water to restore the fish. The competing needs must be reconciled through the consultation process, which the Secretary has yet to initiate.

Moreover, the Secretary has never contended that he needs all the water to avoid jeopardizing the fish. His contentions are based, instead, on the creation of *optimal* spawning conditions for the restoration of the fish.

[4] In an analogous area the District of Columbia Circuit held that the National Environmental Policy Act may permit temporary postponement of the enforcement of other federal statutes, but does not allow the repeal of those statutes *sub silentio* at the administrative level. *National Audubon Society* v. *Watt*, 678 F.2d 299 (D.C. Cir. 1982).

There is another construction of the Endangered Species Act that even more directly reconciles the two statutes at issue here. It is not at all clear that Section 7(a)(1) of the Act, which directs the Secretary to utilize his "authorities" in furtherance of the Endangered Species Act's purposes, empowers (much less directs) the Secretary to convert Stampede into a restoration project. The Secretary's "authorities" are circumscribed by the limits defined by Congress, which was well aware of the need to protect the fish in Pyramid Lake when it enacted the Washoe Project Act in 1956. To that end, Congress directed the Secretary to construct a fish hatchery for restoration of the Pyramid Lake fishery, the Marble Bluff Dam to regulate fish flows in the lower Truckee, and the Pyramid Lake Fishway. The Washoe Project Act, however, specifically limited the expenditures for these purposes to $2 million out of a total project budget of $52 million. 43 U.S.C. §§ 614(c)-614(d); App. 149a. Thus, Congress has already defined what "authorities" the Secretary may utilize for restoration of the Pyramid Lake fishery, and these "authorities" are the ones that the Secretary is required to utilize under the Endangered Species Act. The Secretary has spent $7.9 million to build the Marble Bluff Dam and the Pyramid Lake Fishway and, thus, has already utilized the "authorities" given to him by Congress to restore the fish. Nothing in the Washoe Project Act or the Endangered Species Act gives the Secretary additional "authorities" to convert Stampede into a restoration project.

The Ninth Circuit's decision is based upon a fundamental misreading of *TVA* v. *Hill*. In that case, there were two options open to TVA: to complete the Tellico Dam or not to complete it. If the Dam were not built, nothing at all would happen to the snail darter; if it were built, the snail darter would be totally destroyed. Therefore, there was an "irreconcilable conflict" between

the two options, 437 U.S. at 193, and pursuant to the plain language of Section 7 of the Endangered Species Act, this Court held that the snail darter must be protected.

In this case, there are also two options open to the Secretary, but they are of an entirely different nature: to use all of Stampede's water to restore the fish by attempting to create perfect spawning conditions, or to use part of the water to maintain the species while the rest of the water is used for the statutorily-mandated reimbursable purposes that lie at the heart of the Washoe Project Act. Here, there is no question whatever of the fish being destroyed. Neither option will result in such destruction. There is thus no irreconcilable conflict in the case. The only issue is how to define the Secretary's duty toward the fish under the Endangered Species Act where he is faced with countervailing congressional directives and has alternative means at his disposal to restore the species.

While the Endangered Species Act requires alteration of an agency's ongoing project in the case of an irreconcilable conflict unless an exemption is granted, this Court's ruling in *TVA* v. *Hill* clearly implied that an agency could not forego its congressionally mandated mission unless the Secretary had determined through the consultation process that the agency's action might jeopardize the continued existence of a listed species. *Id.* at 182-185. No consultation has taken place in the case at bar. What the Ninth Circuit failed to recognize is that this case presents the question of competing, but not irreconcilable, congressional mandates.

When two congressional enactments are "capable of co-existence," each must be regarded as effective. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). In noting that "Congress foresaw that § 7 would, *on occasion*, require agencies to alter ongoing projects in order to ful-

fill the goals of the Act," *TVA* v. *Hill*, 437 U.S. at 186 (emphasis added), this Court acknowledged that reconciliation of the Endangered Species Act with other congressional directives is possible in many instances. Thus, the Secretary may not abandon the purposes expressed in the Washoe Act unless he determines through the consultation process that the operation of Stampede for those purposes is "likely to jeopardize the continued existence" of the cui-ui and the Lahontan cutthroat trout.

Coverting Stampede into a restoration project for the Pyramid Lake Fishery has had a direct impact on the ability of the area to contend with drought conditions and on the potential for future growth in Truckee Meadows. Because Nevada receives so little precipitation, local government must plan future growth so that the demand for water does not exceed the available supply in critically dry years. Accordingly, no new development for Truckee Meadows can be approved unless the applicant has obtained a commitment from Sierra Pacific Power Company that it has adequate water supplies to provide service. Because the Secretary is presently prohibited from selling M&I water to the District, Sierra Pacific has been unable to meet its service commitments. The waiting list for these commitments contains more than 130 applications that cannot be filled, which represent over 7000 residential units and several industrial parks and hotels.

The conversion of Stampede also will affect the Stampede Powerplant, which is currently under construction and is scheduled to be completed in the fall of 1985. If the Ninth Circuit's decision stands, the Bureau of Reclamation estimates that the Powerplant will produce 5,620,000 kilowatthours per year, which "represents the minimum power generation alternative," at an estimated repayment cost of 67.6 mills per kilowatthour.

49 Fed. Reg. 39,099 (1984).[5] If, on the other hand, the Secretary sells M&I water to the District, power production will be enhanced to an estimated 14,700,000 kilowatthours per year at 25.9 mills per kilowatthour. *Id.*

But the Ninth Circuit's decision is not limited to the facts in the case at bar. Dozens of existing reclamation projects cover the western States, many of which fall within the Ninth Circuit's territorial jurisdiction. That court's decision will almost certainly require the Secretary to abrogate the congressional directives associated with these projects until such time as the listed species in these areas no longer need protection under the Endangered Species Act—in many cases, indefinitely.[6]

In its latest quarterly tabulation of water service and repayment contract negotiations, the Bureau of Reclamation lists 93 negotiations taking place in July-September 1984. 49 Fed. Reg. 30,801 (1984). These projects alone account for millions of dollars recouped each year through repayment contracts. Not only would the Ninth Circuit's decision prevent finalization of these contracts and compel the unilateral abrogation of existing repayment contracts and privately owned water rights, thus resulting in tremendous budgetary losses and subjecting the government to numerous breach of contract actions, but it would also totally preclude the use of water for irrigation and M&I uses. Instead, the resources would be spent solely on listed species that,

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[5] The Bureau has announced its intention of giving 2,000,000 kilowatthours per year free of charge to the Lahontan National Fish Hatchery and the Marble Bluff fish facility. Thus, under the existing operation of Stampede, the amount of commercially available hydroelectric power would be minimal. Moreover, because providing power to the fisheries represents a non-reimbursable function, the cost could not be recouped by charging other users.

[6] The Secretary continues to list many new species under the Act. *E.g.*, 49 Fed. Reg. 28,583 (1984). Even projects not presently affected by a listed species may soon be impacted.

in many instances, have never been placed in jeopardy by the operation of these projects. Population growth in the western States is often directly tied to the availability of water from these projects, and any conversion to restoration purposes would violate this historical reliance.

The proposed Narrows Unit Project, which is to be located on the South Platte River in northeastern Colorado, illustrates the difference between the jeopardization standard required by the Endangered Species Act and the standard applied by the Ninth Circuit. The Project, like Stampede, is designed to provide flood control, irrigation, M&I water, fish and wildlife development, and recreation. The Fish and Wildlife Service has issued a biological opinion concluding that the Narrows Unit Project, as proposed, is likely to jeopardize the continued existence of the whooping crane, an endangered species, and adversely modify a 53-mile stretch of the Platte River in Nebraska (approximately 195 miles downstream from the Project), which is a critical habitat for the cranes. Fish and Wildlife Service, U.S. Dep't of Interior, Narrows Unit Biological Opinion—Whooping Crane 2 (Jan. 20, 1983). Pursuant to Section 7(b) of the Endangered Species Act, the Fish and Wildlife Service recommended "reasonable and prudent alternatives" to the proposed operation of the Narrows Project. The Service's alternative would require the Narrows Unit Reservoir to provide supplemental flows for the crane's roosting habitat and for channel width maintenance. These supplemental flows—the amount needed to insure that the cranes are not jeopardized—represent approximately one-third of the Reservoir's yield, leaving the remainder to be used for the Project's original purposes. The Endangered Species Act contemplates precisely this type of consultation process through which the competing water uses can be reconciled. However, under the lower court's ruling here, the Secretary

would be directed to use the Reservoir's *entire* yield to restore the crane, instead of the level needed to insure that the cranes will not be jeopardized. An accommodation of the Endangered Species Act and the Narrows Project would fulfill the objects of *both* statutes, while the Ninth Circuit's ruling would frustrate the congressional directives underlying the Narrows Project.[7]

Because all other federal agencies are under the same obligation as the Secretary to "utilize their authorities in furtherance of the purposes" of the Endangered Species Act, 16 U.S.C. § 1536(a)(1), the Ninth Circuit's ruling applies to all agencies and directs them to ignore their primary missions even though no jeopardization of listed species is involved.[8] The water flows

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[7] The Narrows Unit Project is just one of many projects affected by the Court of Appeals' ruling. Other projects that face similar problems include Ruedi Reservoir, Green Mountain Reservoir and the Fontenelle Dam, which are within the Colorado River Storage Project area. Under the Ninth Circuit holding, the Secretary now has free reign over any reclamation project that might have an impact on endangered or threatened species. His discretion is unlimited, his only mission is to restore the species, and he may ignore existing congressional directives to do otherwise. Such a tortured reading of the Endangered Species Act could not have been intended by Congress.

[8] For example, in deliberations over the enactment of the Endangered Species Act, Representative Dingell, the House manager of the bill, discussed Air Force target bombing along the gulf coast of Texas that threatened whooping cranes. According to Representative Dingell, Section 7 would require the Secretary of Defense to take steps to eradicate the threat. 119 Cong. Rec. 42,913 (1973). Under the Ninth Circuit's holding here, however, the Secretary of Defense would be required to go much further than insuring that the Air Force's target practice would not jeopardize the cranes. Instead, he would have to convert the primary mission of the Air Force from national defense to the restoration of whooping cranes. Congress could not have intended such an implausible result. In the 1978 amendments to the Endangered Species Act, Congress implicitly rejected the Ninth Circuit's reasoning by granting the Secretary of Defense the power to exempt agency actions from the

created through construction and operation of federal reclamation projects are resources that are available for use by the Secretary only because Congress sought to provide for reclamation objectives such as flood control, irrigation, and M&I use. These flows cannot be guaranteed or controlled without the creation of massive dams and reservoirs to harness them. Therefore, where there is no claim of jeopardization, directing the Secretary to ignore the purposes for which these projects were constructed is akin to directing other federal agencies to use their appropriated funds for purposes other than those authorized by Congress.

Only one example of the pernicious ramifications of the lower court's decision is the chaos that would result if federal highway funds were impounded for restoration purposes. In the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.*, Congress created the National System of Interstate and Defense Highways, deeming this system of "primary importance to the national defense" and "essential to the national interest." 23 U.S.C. § 101 (b). Budget authority in fiscal 1983 for highways alone was $13.2 billion. If the Ninth Circuit's ruling stands, the congressional goal of revitalizing this country's transportation infrastructure will never be reached because the Secretary of Transportation will be required to utilize federal highway funding solely for the restoration of listed species.[9]

Act when necessary for reasons of national security. 16 U.S.C. § 1536(j).

The quandry is a real one. *See Wash. Post*, Oct. 30, 1984, at A10, col. 5 (proposed $250 million Army National Guard training site may have to be abandoned because of two species of endangered bats).

[9] The Fifth Circuit Court of Appeals has ruled that the Secretary of Transportation's duties under the Endangered Species Act *can be reconciled* with the primary obligations of the Department of Transportation. *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife*

The Secretary of Agriculture's duty under the Multiple Use, Sustained Yield Act of 1960, 16 U.S.C. §§ 528-529, to develop the renewable resources of the national forests provides another example of the far-reaching implications of the Ninth Circuit's decision. The Forest Service, an agency of the Department of Agriculture, oversees the harvesting of thousands of acres of timber each year, and its activities are constantly monitored by environmental groups for violation of the Endangered Species Act and other environmental legislation.[19] The Forest Service is presently able to pursue the balanced multiple use of our national forests in a manner that protects pristine wilderness areas and insures the continued protection of listed species. The Ninth Circuit's decision in the case at bar repeals the congressionally expressed policy of multiple use and would require the Forest Service to manage the forests for one purpose only —restoration of listed species to their historical quotient.

When it enacted the Endangered Species Act, Congress emphasized the priority of halting and reversing the trend of losing endangered species to extinction. As pointed out above, this Court noted in *TVA* v. *Hill* that Section 7 would, "*on occasion*" (*i.e.*, where a conflict occurs), require an agency to alter an ongoing project. 437 U.S. at 186 (emphasis added). But where there is no conflict between an agency's primary mission and the continued existence of a listed species, a federal agency

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Federation, 429 U.S. 979 (1976). Federal agencies, according to the Fifth Circuit, are required by the Endangered Species Act to take "all necessary action to insure that [their] actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species." 529 F.2d at 371. The Fifth Circuit's holding delineated the affirmative scope of an agency's duty under the Endangered Species Act in a manner consistent with the agency's primary mission and directly at odds with the duty mandated by the Ninth Circuit.

[19] *See, e.g.*, Peterson, *Plan to Put Logging Roads in Wild Areas Is Challenged, N.Y. Times*, Oct. 31, 1984, at A12, col. 1.

should have neither the duty nor the discretion to ignore the primary directive given to it by Congress. Thus, while the Secretary must insure that his operation of Stampede is not likely to jeopardize the cui-ui and the Lahontan cutthroat trout, he cannot otherwise ignore the purposes of the Washoe Project Act.

No other Circuit has ruled that federal agencies have a duty to utilize their authorities and resources for the restoration of listed species to the detriment of their primary missions. The courts that have reached the issue have required agencies to insure that their actions will not *jeopardize* listed species, thus establishing a conflict in principle with the Ninth Circuit.[11]

The implications of the Ninth Circuit's decision stretch far beyond Stampede Dam or any other reclamation

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[11] *See, e.g., Roosevelt Campobello Int'l Park Comm'n* v. *Environmental Protection Agency*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607 (D.C. Cir. 1980); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-04 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, *supra*.

To buttress its reasoning in *Carson-Truckee II*, the District Court relied on two other District Court cases involving hunting regulations promulgated by the Secretary of the Interior. *See Connor* v. *Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978); *Defenders of Wildlife* v. *Andrus*, 428 F. Supp. 167 (D.D.C. 1977). In *Defenders of Wildlife*, the court ruled that the Secretary, when issuing hunting regulations, must act to increase the population of protected species. *Id.* at 170. Central to the District Court's reasoning was legislative history "that Congress considered hunting regulations among the more important weapons in the fight to save vanishing species of wildlife." *Id.* Congress clearly intended that such regulations be used affirmatively to restore endangered species. It by no means follows that a reclamation project enacted for purposes having little connection with fish and wildlife conservation may be converted into an affirmative restorative tool at the Secretary's discretion.

Connor also dealt with hunting regulations. The District Court invalidated a proposed ban on duck hunting in certain areas because the record failed to support a finding that the hunting ban would benefit the ducks and even indicated that the ban would have an adverse impact on the ducks' critical habitats.

project. The ruling requires all federal agencies to effectuate the purposes of the Endangered Species Act by utilizing their funds and other resources to restore listed species, without regard to (1) the agency's primary mission and (2) whether the agency's action would have otherwise jeopardized the species. Petitioners submit that, where the agency action will not jeopardize the species, the agency's primary mission should remain undisturbed. Congress intended that agencies defer to the Endangered Species Act only where such conflicts arise. This case thus assumes unique importance because it will determine the proper scope of an agency's affirmative duties under the Endangered Species Act where there is no conflict between the Act and the agency's primary mission—a question not squarely addressed by this Court in *TVA* v. *Hill* or any other case, but one demanding prompt review because of its extraordinary implications.

2. Federal Reclamation Laws Require the Secretary to Obtain Reimbursement for Stampede Dam Waters Not Needed to Meet His Obligations Under the Endangered Species Act.

In the earlier stages of this litigation, the Secretary and the Tribe contended that the Washoe Project Act imposed no obligation on the Secretary to seek reimbursement for the Project's construction and operation costs. On cross-motions for summary judgment, the District Court ruled in favor of petitioners, holding that it is "clear in light of the statute's background that Congress intended the imperative 'shall' [in the last sentence of 43 U.S.C. § 614a(c)] to compel the Secretary to execute a cost reimbursement contract with the District." App. 18a. After the trial, however, Judge Solomon advised the parties that he considered the issue open for discussion. In his post-trial brief, the Secretary *conceded* that the reclamation laws imposed the duty to seek reimbursement and that he is authorized to sell Stampede water for M&I

purposes. Judge Solomon treated these concessions as dispositive. App. 34a.[12]

The Ninth Circuit's ruling that no reimbursement obligation exists[13] fundamentally misconstrued the Washoe Project Act and federal reclamation law in general. The Washoe Project Act provides that the construction, operation, and maintenance of Stampede are to be governed by the federal reclamation laws. 43 U.S.C. § 614(a). To determine the extent of the Secretary's obligation to seek reimbursement for Stampede's costs, the Court of Appeals should have "looked to the provisions of the whole law and to its object and policy," *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975), and construed the statutory scheme in the manner that best effectuates congressional intent. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 386 (1948).

Early in this century the reclamation laws emerged from the need to reclaim arid portions of western lands for development. The massive cost of harnessing scarce water resources was too great for private interests and state governments. In response to this need and the inability of the western States to redress it, Congress enacted the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, which directed the Secretary to reclaim certain lands through irrigation projects and then to restore the lands to entry for development. The funding for the initial projects came from the Reclamation Fund, which was established with the proceeds from the sales of public lands.

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[12] Neither the Secretary nor the Tribe appealed from these holdings. Consequently, little attention was focused upon this issue in the briefs and at oral argument before the Court of Appeals.

[13] In two parts of its opinion (App. 4a, 5a), the court purported not to be finally deciding the issue. In a third part (App. 8a), however, the issue was squarely and finally decided. Moreover, the Secretary is acting and will continue to act on the basis of this ruling. It is, therefore, clearly before this Court for decision.

Congress intended that the Fund be constantly replenished through payments made under reimbursement contracts with the water users. *See Swigart* v. *Baker*, 229 U.S. 187, 194, 197 (1913) (maintenance costs are properly chargeable to water users).

During the last half-century, Congress has expanded the reclamation program beyond its original focus on irrigation. The Wayne Aspinall Project Act is an example of this expanded coverage. Congress legislated the following uses for Stampede Dam: flood control, irrigation, storage against drought, power generation, development of fish and wildlife resources, and other beneficial purposes. 43 U.S.C. § 614.

Despite the enlargement of congressional directives, the reimbursement obligation has remained constant throughout the years. As part of the authorization procedure for new projects, the Secretary is required to identify those portions of a new project's costs for which reimbursement can be obtained from water users. Specifically, the Secretary must delineate what part of the project's costs can be allocated to irrigation, power, and M&I users that will "*probably be repaid by the water users*" or "*returned to the United States.*" 43 U.S.C. § 485h(a) (emphasis added). If all of the project's costs will be repaid, then the project is automatically authorized without further action by Congress. But if a portion of the project is for non-reimbursable uses, such as recreation or fish and wildlife development, then the Secretary cannot proceed until Congress has approved the expenditure of funds for the non-reimbursable uses. Thus, the clear import of the Section 485h(a) authorization procedure is to assure that Congress is notified and approves any non-reimbursable features of a project before it is constructed. This mandate obviously would be thwarted if, after congressional approval is given with the expectation of substantial repayment, the Secretary can then decide to operate the project exclusively for non-reimbursable purposes.

The Secretary's allocation of the Washoe Project's costs contemplated that 86% of the Project's total costs of construction, operation, and maintenance would be repaid to the United States.[14] Based on the Secretary's feasibility report, Congress anticipated that the major portion of the Project's costs would be recouped through reimbursement contracts. *See* 102 Cong. Rec. 7040, 12,229 & 13,939 (1956). The Ninth Circuit, however, overlooked the legislative history of the Washoe Project Act and judicially rewrote the statute, deleting the reimbursement obligation and the $2 million limitation for the fishery. Its ruling is inconsistent with the statutory scheme of the federal reclamation laws generally and portends serious consequences not only in this case but in many other reclamation projects where the Secretary is authorized to proceed with construction before entering into a repayment contract.[15] The Appendix includes a partial list of reclamation projects fitting this description. App. 150a. The Court of Appeals' decision allows the Secretary to operate Stampede (and many other projects) *exclusively* for non-reimbursable purposes, despite congressional intent that 86% of Stampede's costs be reimbursed by water users.

Congress has consistently required that those who directly benefit from federal reclamation projects bear most of the associated costs. This reimbursement obligation has been implicit since the enactment of the 1902

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[14] The remaining 14% represents $2 million allocated to development of fish and wildlife resources, $6.1 million to flood control, and $100,000 to recreation, all of which are non-reimbursable uses.

[15] The Court of Appeals confused the general obligation to obtain reimbursement for construction and operation costs with the point at which repayment contracts must be executed. App. 5a. Stampede was constructed before contracts were executed because of the need for immediate flood control and protection in Truckee Meadows. That Congress chose to leave the timing open does not relieve the Secretary of the obligation under reclamation law generally to obtain reimbursement.

Reclamation Act. The Ninth Circuit's decision—squarely in the face of the Secretary's concession to the contrary—has a serious budgetary impact and will imperil the construction of new reclamation projects in the future.

CONCLUSION

For each of the reasons above, petitioners respectfully request the Court to grant the writ and reverse and remand the decision of the court below.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1547P2

TABLE OF CONTENTS

Appendix A — Page

Decision of United States Court of Appeals for the Ninth Circuit, in *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984), decided August 22, 1984 ..... 1a

Appendix B

Memorandum Decision of Hon. Harry E. Claiborne, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Andrus*, Civ. No. R-76-152-HEC, entered August 27, 1979 ..... 11a

Appendix C

Decision of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982), decided February 16, 1982 ..... 23a

Appendix D

Decision of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982), decided October 4, 1982 ..... 37a

Appendix E

Judgment of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 GJS, entered on October 27, 1982 ..... 55a

Appendix F

Defendant's Motion to Amend Judgment in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 BRT, made on November 5, 1982 ..... 57a

TABLE OF CONTENTS—Continued

Appendix G — Page

Defendant's Memorandum in Support of Motion to Amend Judgment in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 BRT, submitted on November 5, 1982 ..... 59a

Appendix H

Order of Hon. Gus J. Solomon, United States District Court for the District of Nevada, in *Carson-Truckee Water Conservancy District* v. *Watt*, Civ. No. R-76-152 GJS, entered on December 27, 1982 ..... 62a

Appendix I

Endangered Species Act of 1973, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.* 64a

Appendix J

Washoe Project Act of 1956, 70 Stat. 775, as amended, 43 U.S.C. §§ 614-614d 145a

Appendix K

Projects Not Requiring Repayment Contracts Prior to Construction 150a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-1549, 83-1562, 83-1603 and 83-1714.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, and THE STATE OF NEVADA,
Plaintiffs-Appellanis, Cross-Appellees,

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, *et al.*,
Defendants-Appellees,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor-Appellee, Cross-Appellant.

Argued and Submitted Dec. 15, 1983

Decided Aug. 22, 1984

An Appeal from the United States District Court for the District of Nevada.

Before DUNIWAY, Senior Circuit Judge, PREGERSON, and NORRIS, Circuit Judges.

PREGERSON, Circuit Judge:

The Carson-Truckee Water Conservancy District and Sierra Pacific Power Company (appellants) sought a declaratory judgment that the Secretary of the Interior (Secretary) violated the Washoe Project Act, 43 U.S.C.A. §§ 614-614d (West 1964), and related reclamation laws in refusing to sell water from the Stampede Dam and Reservoir on the Little Truckee River for municipal and industrial (M&I) use in Reno and Sparks. In addition, Nevada sought a determination that the Secretary was required to obtain a permit from the Nevada State Engineer to operate the Stampede Dam in California. The Pyramid Lake Paiute Tribe of Indians (Tribe) intervened in support of the Secretary. We affirm in part and vacate in part.

I. *Factual Background and District Court Decisions*

A detailed recitation of the relevant facts may be found in the district court's two opinions. *Carson-Truckee Water Conservancy District v. Watt* (*Carson-Truckee I*), 537 F. Supp. 106 (D. Nev. 1982); *Carson-Truckee Water Conservancy District v. Watt* (*Carson-Truckee II*), 549 F. Supp. 704 (D. Nev. 1982). The Little Truckee River flows into the Truckee River, which then flows from California into Nevada and into Pyramid Lake. Stampede Dam is located on the Little Truckee in California. The Secretary now operates Stampede Dam in a way that conserves two species of fish, the cui-ui fish and Lahontan cutthroat trout, that are protected under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1982). *See Carson-Truckee I*, 537 F. Supp. at 109; *Carson Truckee II*, 549 F. Supp. at 710-11. Appellants concede that the Secretary's obligations under ESA supersede his obligations under the Washoe Project Act and related federal reclamation laws. *Carson-Truckee II*, 549 F. Supp. at 708. Appellants, however, challenge the extent of the Secretary's obligations under ESA.

The district court bifurcated the issues. In *Carson-Truckee I*, the district court held that (1) plaintiffs have standing to challenge the Secretary's operation of the dam, (2) plaintiffs have a private right of action to enforce the Secretary's obligations under the Washoe Project Act, (3) M&I use is a "beneficial purpose" for which the Secretary is authorized to sell the project's water under the Washoe Project Act, 43 U.S.C.A. § 614, (4) the Secretary is required to sell water from Stampede Dam not needed to fulfill his trust obligations to the Tribe and his obligations under ESA, and (5) the Secretary does not need a Nevada state water permit for Stampede Dam's present operation in California.

After deciding *Carson-Truckee I*, the district court received evidence on the question of how much water was required to fulfill the Secretary's obligations under ESA and on an alternate plan, submitted by appellants to the Secretary, for operation of the dam. The parties submitted direct evidence in the form of written expert testimony. The parties then were afforded the opportunity to fully cross-examine the experts.

After the hearing, the district court, in *Carson-Truckee II*, ruled that (1) ESA required the Secretary to give priority to conserving the cui-ui fish and Lahontan cutthroat trout so long as they were endangered and threatened, and (2) the Secretary's finding that there was no excess water to sell after fulfilling those statutory obligations was supported by substantial evidence and therefore his operation of Stampede Dam was neither arbitrary nor capricious. The court also found that appellants' proposed alternate plan for the operation of the dam would jeopardize the fish and that the Secretary did not abuse his discretion in rejecting the plan.

II. *Analysis*

We affirm and adopt all but one of the district court's holdings for the reasons ably stated by Judge Solomon

in his two learned opinions. The one holding we vacate is the court's ruling in *Carson-Truckee I* that the Washoe Project Act obligates the Secretary to sell all water from Stampede Dam that remains after he has fulfilled his obligations under ESA and under the Tribe's reserved water rights.[1] *Carson-Truckee I*, 537 F. Supp. at 112-13. The following analysis assumes a familiarity with the district court's opinions.

(a) *Obligation to sell water*

We agree with the district court's conclusion that M&I use is a "beneficial purpose" for which the Secretary is authorized to sell the project's water, *Carson-Truckee I*, 537 F. Supp. at 112. We do not necessarily agree, however, that the Secretary is obligated to sell the water for M&I purposes simply because those purposes are the only present uses for which the Secretary can obtain some reimbursement for project costs.

Reclamation projects funded by the federal government are generally intended to be reimbursed through the sale of project water. *See, e.g.*, 43 U.S.C. § 485h(a) (1982) (Secretary must submit findings on the amount of costs that will "probably be repaid by water users" before construction expenditures for a given project may be made). The district court held that Congress had anticipated that the Washoe Project would be 86% reimbursable. *Carson-Truckee I*, 537 F. Supp. at 111. But circumstances have changed. Although Congress in passing the Washoe Project Act intended that irrigation was the Act's primary purpose, irrigation is no longer a viable use of the project. Appellants are the only entities that seek to distribute the water for reimbursable purposes. Thus, they argue that the Secretary must sell the project's water to them.

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[1] We do not consider the Secretary's obligation to provide water to the Tribe for the reasons given by the district court in *Carson-Truckee II*, 549 F. Supp. at 712-13.

The Washoe Project Act, however, unlike other reclamation project authorizations, did not prohibit the Secretary from constructing the project until repayment contracts for the project had been entered into. *Compare* San Angelo Project Act § 2(b), 43 U.S.C.A. § 615p(b) (West 1964) (Secretary must enter into contracts for repayment of project costs before constructing project) with Washoe Project Act § 2(b)-(c), 42 U.S.C.A. § 614a (b)-(c) (Secretary must enter into repayment contracts before delivering water). The Washoe Project Act merely prohibits the Secretary from delivering project water for reimbursable uses without first obtaining a repayment contract. *See* Washoe Project Act § 2(a), 43 U.S.C.A. § 614a(a) (federal reclamation laws govern Secretary's construction, operation, and maintenance of Washoe project); 43 U.S.C. 485h(c) (1982) (section of federal reclamation law governing sale of reclamation project water for M&I use).

Because we affirm the district court's holding that, under ESA, the Secretary is permitted to use at this time all of the project's water to conserve the two species of fish, we need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future. The Secretary's asserted obligation to sell project water for M&I purposes should be considered when his superseding obligations to the Tribe, *see supra* note 1, and under ESA have been fulfilled. Accordingly, we vacate the district court's opinion on this narrow point.

(b) *Appellants' arguments*

We feel constrained to elaborate our reasons for rejecting appellants' arguments against two of the district court's holdings. Those holdings are that (1) ESA requires the Secretary to give priority to the conservation of threatened and endangered species, and (2) the Secretary did not abuse his discretion both in determining that there was no excess water to sell for M&I purposes

after his obligations under ESA were fulfilled, and in rejecting appellants' alternate plan for operating Stampede Dam. Our comments address specific arguments raised on appeal. We make them only to supplement the district court's reasoning.

(1) *ESA's requirements.*

Appellants urge a reading of ESA that would lead to a result at odds with the statute's clearly stated objectives. Appellants contend that the Secretary's authority is defined solely by ESA § 7(a)(2), 16 U.S.C. § 1536 (a)(2).[2] Thus, they argue that the Secretary is authorized only to take actions that avoid "jeopardizing" the continued existence of a species. Appellants contend that the Secretary may not do more than that.

In addition to its § 7(a)(2) "jeopardy" provision, however, ESA also directs the Secretary to conserve threatened and endangered species to the extent that they are no longer threatened or endangered. Appellants, relying *solely* on § 7(a)(2), would have us ignore the other sections of ESA directly applicable here and relied on by the district court. *Carson-Truckee II*, 549 F. Supp. at 708-10. ESA § 2(b), (c), & § 3(3), 16 U.S.C. § 1531(b), (c), & § 1532(3).[3] ESA § 7(a)(1), moreover, specifically

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[2] Section 7(a)(2) states in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .

16 U.S.C. § 1536(a)(2) (1982).

[3] Section 2(b) states the purposes of ESA:

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a

directs that the Secretary "shall" use programs administered by him to further the conservation purposes of ESA. 16 U.S.C. § 1536(a)(1).[4] Those sections, as the district court found, direct that the Secretary actively pursue a species conservation policy. *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978) (ESA requires the Secretary to give highest priority to the preservation of endangered species; Congress intended to "halt *and reverse* the trend toward species extinction, whatever the cost." (emphasis added)).

The purpose of ESA § 7(a)(2) is to ensure that the federal government does not undertake actions, such as building a dam or highway, that incidentally jeopardize

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program for the conservation of such endangered species and threatened species . . . .

16 U.S.C. § 1531(b).

Section 2(c) states in pertinent part:

[A]ll Federal departments and agencies shall seek to conserve endangered species and threatend species and shall utilize their authorities in furtherance of the purposes of this chapter.

16 U.S.C. § 1531(c).

Section 3(3) defines "conserve":

The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.

16 U.S.C. § 1523(3).

[4] Section 7(a)(1) states in pertinent part:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . . .

16 U.S.C. § 1536(a)(1).

the existence of endangered or threatened species. See *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 for an example of § 7(a)(2)'s application. Contrary to appellants' contention, ESA § 7(a)(2) is inapplicable here because the Secretary has not undertaken a project that threatens an endangered species. Instead, following the mandate of ESA § 7(a)(1), § 2(b), (c), & § 3(3), 16 U.S.C. § 1536(a)(1), § 1531(c), (b), & § 1532(3), the Secretary actively seeks to conserve endangered species. Thus, the district court properly applied ESA § 2(b), (c), & § 3(3) rather than ESA § 7(a)(2) to this case.

Applying the proper code sections to this case, the Secretary's decision is well-justified. The Washoe Project Act anticipates but does not require the Secretary to sell water to recover project construction costs. *See supra* pp. 4-6. ESA, on the other hand, directs the Secretary to use programs under his control for conservation purposes where threatened or endangered species are involved. Following this directive, the Secretary here decided to conserve the fish and not to sell the project's water. Given these circumstances, the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection.[8]

(2) *Abuse of Discretion.*

In addition to challenging the extent of the Secretary's obligations under ESA, appellants presented the Secretary with a proposed alternate plan under which they

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[8] Because we hold that the Washoe Project Act does not require the Secretary to sell water for M&I use, we need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes under ESA § 2(b), (c), § 3(3), & § 7(a)(1). Similarly, because the Secretary actively seeks to use the project for conservation purposes, we need not consider the extent of his affirmative obligations under ESA § 2(b), (c), § 3(3), & § 7(a)(1) had he decided neither to sell the water nor to protect the fish.

maintained he could both conserve the fish and sell water for M&I use. The plan included planting miles of shade trees along the river to reduce water temperature, confining the river to a single channel, and constructing fish hatcheries. The district court found that appellants' proposed alternate plan would jeopardize the fish. He then held that the Secretary had not abused his discretion in rejecting the plan and in determining that he had no excess water to sell for M&I purposes after fulfilling his obligations under ESA. The district court's holding is based in part upon findings of fact about the spawning requirements of the cui-ui fish and Lahontan cutthroat trout. *Carson-Truckee II*, 549 F. Supp. at 711.

Appellants raise two objections to the district court's holding. First, appellants contend that, although a district court's factual determinations are usually reviewed under a clearly erroneous standard, the nature of the hearing conducted by the district court in this case warrants a less deferential standard of review. Appellants assert that the hearing before the district court was a "paper hearing," in which the demeanor and credibility of the expert witnesses was not involved. Second, they maintain that the district court was clearly erroneous in any event because its decision, which affirmed the Secretary's rejection of appellants' proposed plan, was based on a finding that appellants' plan would result in a constant river temperature of 68 degrees. The fish cannot reproduce in water that warm.

Neither argument persuades us to reach a different result. Although the district court required that expert testimony be submitted in writing, the experts were cross-examined in the court's presence. And, even if we were to employ a less deferential standard of review, we nonetheless would affirm the district court on its overall holding that the Secretary did not abuse his discretion.

The 68 degree finding is found in a brief footnote in the district court's opinion. *Carson-Truckee II*, 549 F. Supp. at 711 n.9. The district court's holding does not stand or fall with that finding. Even assuming that the district court's 68 degree finding was clearly erroneous,[6] we think the district court's other findings—for example, that (1) appellants did not meet their burden of showing that the Secretary abused his discretion, (2) it is not feasible to operate Stampede Dam for both M&I and fishery purposes, and (3) appellants' plan would require the expenditure of huge sums, thereby defeating the purpose of obtaining reimbursement, *Carson-Truckee II*, 549 F. Supp. at 711-12—amply support the court's approval of the Secretary's action.

The judgment is AFFIRMED in part and VACATED in part.

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[6] The court noted that the appellants' plan would result in a constant river temperature of 68 degrees. Such a temperature renders it too hot for the fish to reproduce successfully. Appellants point out that the evidence introduced before the district court indicated that appellants' plan—planting miles of shade trees, dredging the channel, and undertaking other measures—would result in occasional, not constant, 68 degree river temperatures. The district court may therefore have erroneously reported appellees' expert's testimony.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152-HEC

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,

Plaintiffs,

vs.

CECIL D. ANDRUS, Secretary of the Interior, *et al.*,

Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Defendant-Intervenor.

[Entered Aug. 27, 1979]

MEMORANDUM DECISION

This law suit arises out of a dispute involving the Little Truckee River, a tributary of the Truckee River, which flows from the State of California to the State of Nevada downstream through the Stampede Dam and Reservoir.

On October 1, 1976, the Carson-Truckee Water Conservancy District (hereinafter, the "District"), Sierra Pacific Power Company and the State of Nevada filed their first amended complaint for mandamus and injunctive and declaratory relief. Six causes of action are set forth, all of which relate to the operation of the Stampede Dam and Reservoir by the Federal Defendants. The first, second, and sixth causes of action are predicated on the Washoe Project Act, 43 U.S.C. §§ 614-614d, the Federal Reclamation Laws, 43 U.S.C. §§ 371 et seq., and the Water Supply Act of 1958, 43 U.S.C. §§ 390b et seq. The

third, fourth, and fifth causes of action are based on the laws of the States of California and Nevada.

The Plaintiffs have submitted a motion for summary judgment on the sixth cause of action. The Defendants have moved for summary judgment on all claims.

Findings of Fact

The Stampede Dam and Reservoir is part of the Washoe Reclamation Project. Congress authorized the Project on August 1, 1956. Pub.L.No. 84-858, 70 Stat. 775 (codified at 43 U.S.C. §§ 614-614d (1956)). On August 21, 1958, Congress amended the Act to authorize increased construction costs and to add Prosser Creek Dam and Reservoir to the Project. Pub.L.No. 85-706, 72 Stat. 705 (codified at 43 U.S.C. § 614d (1958)).

The Carson-Truckee Water Conservancy District was formed January 27, 1958 under Nevada law to act as a contracting entity to purchase the water stored by the Project. The District is an organization within the definition of 43 U.S.C. § 485a(g), and has the capacity to levy assessments upon all taxable real property located within its boundaries.

The Project consists of two divisions: the Stampede Division and the Watasheamu Division. The Stampede Division is located in the Truckee River Basin and it includes Stampede Dam, Prosser Creek Dam, Marble Bluff Dam and Fishway, and several smaller facilities. The Stampede Dam is located on the Little Truckee River approximately ten miles above the Truckee River junction and immediately west of the Nevada border.

On February 19, 1965, prior to the construction of the Stampede Dam, the District and the United States entered into a contract. In return for the delivery of water, the United States would be repaid a substantial portion of the construction, operation, and maintenance costs of the Project. The agreement also provided that it would not

be effective until the parties agreed to a supplemental contract regarding allocation of costs for the repayment of the Stampede Division.

In August of 1966 the Bureau of Reclamation was in a position to proceed with the construction of Stampede Dam. Two developments, however, threatened to delay the building of the dam. First, it appeared that an existing contract between the United States and the Truckee-Carson Irrigation District would have to be revised.[1] Second, on July 14, 1966, the Commissioner of the Bureau of Indian Affairs informed the Secretary that adequate safeguards were not being used to protect the Pyramid Lake Indians' interest in preserving the lake and its fishery. The Commissioner pointed out that the tribe had withdrawn an initial objection to the Washoe Project because of Department of Interior assurances that some 215,000 acre feet of water would enter the lake when the project became operational. In July of 1966 it was apparent that hydrologic studies could not support the Department's 215,000 acre feet estimate.

Taking into consideration the need to provide adequate flood control protection to both Boca Dam and the Reno/Sparks area, the Commissioner of Reclamation, on Au-

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[1] In 1926 the United States and the Truckee-Carson Irrigation District executed a contract which provided that certain lands in the Truckee and Carson Divisions of the Newlands Project would have a prior right to the use of the waters in the Truckee and Carson Rivers. Until the priority had been satisfied, the United States could not divert or impound waters from these streams for use upon other lands. Therefore, during the time that negotiations for the Stampede amendment to the Washoe Project contract were under way, the United States was also negotiating with the Truckee-Carson Irrigation District seeking a reduction in the District's prior rights to the use of the Truckee and Carson rivers for 87,500 acres of land in the Truckee and Carson divisions of the Newlands Project. The agreement between the United States and the Truckee-Carson Irrigation District required Congressional ratification. By August of 1966 it was apparent that the required approval would not be obtained that year.

gust 8, 1966, recommended to the Secretary of Interior that construction of the Stampede project should commence without the execution of a repayment contract with the Carson-Truckee Water Conservancy District. The Secretary concurred and on August 24, 1966 directed an immediate start for construction. Construction began shortly thereafter.

As the dam neared completion, the District inquired as to the status of the supplemental repayment contract. In response, the Secretary of Interior advised the District that because of the unsettled nature of water right problems in the Truckee and Carson River Basins, the United States was unable at that time to supply municipal and industrial water from Stampede Dam and Reservoir. Until the water rights issues were resolved, the Secretary directed that the dam and reservoir be utilized for flood control, fish and wildlife benefits, and recreation. In the meantime, the Secretary suggested the possibility of negotiating some type of agreement concerning the interim operation of the Stampede Reservoir to produce additional project benefits for the area.

Stampede Dam and Reservoir was completed in 1970. The water from the dam and reservoir has been used solely for non-reimbursable purposes, primarily for the benefit of the Pyramid Lake Fishery.

In 1967 the Secretary of Interior declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.Reg. 4001 (1967). The Lahontan cutthroat trout, originally listed as endangered, was classified as threatened with extinction in 1975. 40 Fed.Reg. 29863 (1975). With regard to the latter species, the Secretary determined that its threatened status was due to the modification of its habitat. In particular he stated:

> ". . . This fish formerly occupied most streams of the Truckee, Carson, and Walker River drainages in western Nevada and east central California. Today

> it occupies much of the same area but is less abundant in the headwaters than it formerly was. Water diversions within its native range continue to be a threat to this species. This problem is especially evident in Pyramid Lake where the diversion of water from the Truckee River has resulted in a lowering of the water level in the lake. The lower water-levels in the lake and the siltation of the mouth of the Truckee River (at its entry into the lake) due to lack of flow has eliminated much of the spawning run of the species in this area.".

40 Fed.Reg. 29864 (1975).

In 1977 in *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D. Nev. 1977), the United States District Court for the District of Nevada rejected the United States' claim seeking the establishment of a *Winters* reserved water right for the Pyramid Lake Paiute Tribe of Indians for fishery purposes.

Conclusions of Law

First, Second and Sixth Causes of Action

The Plaintiffs in the sixth cause of action seek a declaratory judgment that the Secretary of Interior is obligated both to preserve, store, and supply water in Stampede Dam and Reservoir for municipal and industrial purposes and to enter into a water supply and cost reimbursement contract with the Carson-Truckee Water Conservancy District.

The cross-motions for summary judgment on this cause of action raise the following two issues: (1) whether the provisions of the Washoe Project Act compel the Secretary to enter into a cost reimbursement contract with the Carson-Truckee Water Conservancy District, and if so (2) whether the provisions of the Endangered Species of 1973, Pub.L.No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 et seq.), somehow alter that obligation.

The express statutory language of the Washoe Project Act delineates the obligations owed by the Secretary of the Interior to the District. The pertinent provision, § 614a(c) provides:

> ". . . Notwithstanding any other provision of law to the contrary, all net revenues derived from the sale of commercial power from the Washoe reclamation project shall be applied, first, to the amortization of that portion of the cost of constructing the project which is allocated to commercial power with interest on the unamortized balance thereof at the average rate (which rate shall be certified by the Secretary of the Treasury) paid by the United States on its marketable long-term securities outstanding on August 1, 1956, and thereafter to the amortization of that portion of the cost of constructing the project which is allocated to irrigation but which is beyond the ability of the contracting irrigation organizations to repay as provided above, including interest that would have been paid by the irrigators on that portion of the irrigation allocation attributable to furnishing irrigation benefits to excess lands which is not repaid under subsection (b) of this section: *Provided,* That the Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments."

Although the literal meaning of the last sentence indicates that the Secretary is compelled to contract with the District before any water is diverted from the dam, the provision is somewhat ambiguous. The bill which the House of Representatives initially approved did not contain the last sentence while the Senate bill did. Resolution of this difference, as well as other variations between

the House and Senate bills, was the subject of a Conference Committee. 102 CONG.REC. 13825-26 (1956). The members of that committee agreed to recommend to their respective houses a bill which included the last sentence. The House conferees stated in the last two sentences of the Conference Report:

> "That part of the cost attributable to serving supplemental water to excess lands which the Secretary determines to be in excess of the increased payment capacity of such lands would have to be repaid with interest from power revenues. It is the intention of the House conferees that the Federal taxpayers shall be made whole with respect to the cost to the Federal Government attributable to serving excess lands and that the repayment of such ocsts should come from project revenues."

102 CONG.REC. 13826 (1956).

Thereafter, Senator Bible of the State of Nevada stated that "the House conferees accepted the Senate requirement for a conservancy district to be formed in the area which would be authorized to contract for the repayment of the costs of the Washoe Project." 102 CONG.REC. 13939 (1956).

The last sentence of § 614a(c) should also be read in the context of all the legislative proceedings which are replete with expressions that the Federal Government would be reimbursed for the construction costs of the project. Excluding a $2 million allocation to fish and wildlife purposes and an approximate $8 million allotment for flood control, Congress intended that all of the projected $43,700,000 cost be reimbursable. 102 CONG.REC. 7040, 12229, 13938 (1956).

It is well established that when a statute, such as § 614a(c), is susceptible of more than one interpretation a court should construe it in the manner which effectuates the purpose of the statute. *Vermilya-Brown Co. v. Con-*

nell, 335 U.S. 377, 386, 69 S.Ct. 140, 93 L.Ed. 76 (1948), *rehearing denied*, 336 U.S. 928 (1949). While there is no discussion in the legislative history of the ambiguities contained in the last sentence of § 614a(c), it is nonetheless clear in light of the statute's background that Congress intended the imperative "shall" to compel the Secretary to execute a cost reimbursement contract with the District.[2]

Whatever duties the Secretary may have under the Washoe Project Act, the Defendants contend that section 7 of the Endangered Species Act of 1973 prohibits the Secretary from contracting with the District because of the presence of the cui-ui fish and the Lahontan cutthroat trout in Pyramid Lake. Section 7 provides:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such en-

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[2] The Defendants contend that the provisions of the National Environmental Policy Act of 1969, (NEPA), 42 U.S.C. § 4321 et seq., prohibit the Secretary from executing a cost reimbursement contract with the District at this time because (1) NEPA "significantly enlarged the Secretary's discretion", and (2) the Secretary must prepare an environmental impact statement before entering into a contract with the District. Without deciding whether NEPA is applicable to the facts in this case, that statute does not repeal by implication any other statute. *United States v. Scrap*, 412 U.S. 669, 694, 93 S.Ct. 2405, 37 L.Ed.2d (1973). Therefore, the requirements of NEPA do not alter the Secretary's obligations under the Washoe Project Act.

> dangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

16 U.S.C. § 1536.

The Supreme Court in *Tennessee Valley Authority v. Hill*, —— U.S. ——, 98 S.Ct. 2279 (1978) examined the language, history, and structure of the legislation and concluded that Congress intended that the preservation of endangered and threatened species be afforded the "highest of priorities". 98 S.Ct. at 2292. In light of this unconditional Congressional directive, the Supreme Court affirmed the issuance of an injunction enjoining the operation of the Tellico Dam due to the endangered snail darters.

In that case the Secretary, pursuant to his rulemaking authority under section 4 of the Endangered Species Act, 16 U.S.C. § 1533(a)-(d), promulgated regulations in which he stated "that the snail darter apparently lives only in that portion of the Little Tennessee River which would be completely inundated by the reservoir created as a consequence of the Tellico Dam's completion." 98 S.Ct. at 2285. Based upon those regulations, the Supreme Court found that there was an "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7 of the Endangered Species Act". 98 S.Ct. at 2301.

The critical issue in the present case is whether there is an "irreconcilable conflict" between diversion of water from the Stampede Dam and Reservoir to the Reno/Sparks area and the welfare of the cui-ui fish and the Lahontan cutthroat in Pyramid Lake. The regulations do not describe the factors which have contributed to the endangered status of the cui-ui fish. With regard to the threatened Lahontan cutthroat, however, the regulations specifically state that the diversion of water from the

Truckee River has eliminated much of the spawning area in Pyramid Lake. 40 Fed. Reg. 29864 (1975). Based upon this regulation, there is an "irreconcilable conflict" between the Plaintiffs' request to compel the Secretary to execute a cost reimbursement contract and the well being of the Lahontan cutthroat trout.[3]

Since the regulation was promulgated pursuant to the Secretary's rulemaking authority, the standard of judicial review under section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, as interpreted in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), is restrictive. This Court must decide: (1) whether the Secretary acted within the scope of his authority, (2) whether the actual choice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and (3) whether the Secretary followed the necessary procedural requirements. 401 U.S. at 415-417. These questions present genuine issues of material fact.

The first cause of action is substantively the same as the sixth cause of action with the sole distinguishing feature being that while the sixth requests declaratory relief, the first prays for injunctive relief. The same genuine issues of material fact which render summary adjudication of the sixth claim of relief inappropriate, therefore, preclude summary adjudication of the first.

The second cause of action alleges that under the provisions of the Washoe Project Act, the Secretary has acted

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[3] The Plaintiffs maintain that section 7 does not apply to the Stampede Dam since it was completed in 1970, three years prior to the enactment of section 7. In *TVA v. Hill*, 98 S.Ct. at 2297, n. 2, the Supreme Court gave effect to the plain meaning of section 7, namely that it affects all projects which remain to be "authorized, funded, or carried out". As the Court pointed out, the subject matter is covered by section 7 as long as the species has not been extirpated or its habitat destroyed. Neither of these two events have occurred in this case.

arbitrarily and capriciously, and has abused his discretion. In light of this Court's interpretation of 43 U.S.C. § 614a(c), the second claim for relief is superfluous.

Third, Fourth, and Fifth Causes of Action

These three causes of action are all based upon state law. Under § 614a(a) of the Washoe Project Act, Congress directed that the Stampede Dam and Reservoir be constructed and operated pursuant to the Reclamation Act of 1902. Section 8 of that act provides.

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any States or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."

43 U.S.C. § 383.

Under this statute a state may impose any condition on control, appropriation, condemnation, purchase, and distribution of water in a federal reclamation project that is not inconsistent with explicit Congressional directives respecting the project. *California v. United States*, —— U.S. ——, 98 S.Ct. 2985, 2996-3001 (1978). Section 7 of the Endangered Species Act is such a Congressional directive. However, as previously discussed, genuine issues of material fact preclude summary adjudication of the correctness of the Secretary's determination that the Lahontan cutthroat trout command protection under that statute. Summary judgment with respect to the third, fourth, and fifth causes of action is inappropriate at this time.

Based on the foregoing,

IT IS HEREBY ORDERED:

1. That the second cause of action is dismissed.

2. That the motions for summary judgment directed to the first, third, fourth, fifth, and sixth causes of action are denied.

DATED: Aug. 22, 1979.

/s/ [Illegible]
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
D. NEVADA

No. CV-R-76-152-GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,
Plaintiffs,
v.
JAMES G. WATT, SECRETARY OF INTERIOR, *et al.*,
Defendants,
and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

Feb. 16, 1982

OPINION

SOLOMON, District Judge:

This action arose out of a dispute over the waters of the Truckee River, which flows from the mountains of Eastern California through Stampede Dam and Reservoir (Stampede), and through Reno, Nevada. The Truckee empties into Pyramid Lake, which is surrounded by the Pyramid Lake Paiute Indian Reservation.

Plaintiffs Carson-Truckee Water Conservancy District (District) and Sierra Pacific Power Company (Sierra Pacific) seek to appropriate water from the lower Truckee River for Municipal and Industrial (M&I) uses. Plaintiffs contend that the Secretary of the Interior and other federal defendants, by failing to obtain reimbursement for costs of constructing Stampede, violated the Washoe Project Act and related reclamation laws.

Stampede is part of the Washoe Reclamation Project (Project), which Congress authorized in 1956.[1] In 1958, Congress amended the Washoe Project Act to authorize increased construction costs and to add another dam to the Project.[2]

The District was formed in 1958 under Nevada law to act as the agency to purchase the water stored by the Washoe Project, as required under 43 U.S.C. § 485a(g). In 1965, before Stampede was constructed, the District and the United States entered into a contract to repay the United States for most of the Project costs in exchange for the delivery of water. The contract would become effective when the parties agreed to a supplemental contract (the "Stampede Addition") which would allocate the repayment costs of the Stampede Division. The Bureau of Reclamation (Bureau) recommended that the Secretary execute the Stampede Addition, but to date no Secretary has done it.

The parties contest the design and purposes of Stampede's operations. Under the Washoe Project Act, the Secretary controls the flow of the Truckee River by releases from Stampede. Plaintiffs assert that Congress intended the Project be used primarily for "reimbursable" reclamation functions such as irrigation, power generation, and municipal water supply. Stampede was completed in 1970 but the Secretary and Bureau have operated Stampede for only fishery experiments and the development of fish resources, both nonreimbursable functions.

Under the Act, the purposes of the Project were flood control, irrigation, storage against drought, power generation, development of fish and wildlife resources, and

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[1] Pub. L. No. 84-858, 70 Stat. 775 (codified at 43 U.S.C. §§ 614-614d (1956) (Washoe Project Act).

[2] Pub. L. No. 85-706, 72 Stat. 705 (codified at 43 U.S.C. § 614d (1958).

"other beneficial purposes." 43 U.S.C. § 614. The plaintiffs argue that M&I uses are included among its other purposes and that M&I uses are now the only potential source of income for the reimbursement requirements of the Washoe Project Act.

In an earlier proceeding in this case, Judge Harry Claiborne held that Congress intended the Project to be operated so that its construction costs would be substantially repaid. The estimated total cost of the original Project was 41 million dollars. Only eight million dollars of that cost was allocated to flood control, a nonreimbursable operation. Congress also provided a fish hatchery for the restoration of Pyramid Lake Fishery and for a small dam to regulate fish flows on the Truckee River. Congress also prohibited the Secretary from spending more than two million dollars for the development of fish and wildlife resources.

To ensure that a substantial part of the cost of the Project would be repaid, Congress directed the Secretary to enter into repayment contracts before delivering any Project water. 43 U.S.C. § 614a(c). When the original Project was planned, the demand for additional water was expected to come from the irrigation operations of its customers but the rapid growth of Reno and Sparks since the mid-1950's created an unexpected need for additional M&I water. The District asked the Bureau to study this need and to provide for it in the Definite Plan Report for the Project.

The Water Supply Act of 1958, 43 U.S.C. § 390b did not resolve the question whether the Secretary was authorized to use Stampede water for M&I purposes in the Reno-Sparks area. However, in 1963 the Solicitor's office advised the Bureau that M&I uses were authorized under the Washoe Project Act as one of the other beneficial purposes contemplated by the statute. 43 U.S.C. § 614.

In 1964, a special Department of Interior Task Force studied the feasibility of allocating project water for the

maintenance of fishery flows for certain species in Pyramid Lake which spawn along the bed of the Truckee River. The Task Force recommended that 16,900 acre-feet[3] of Stampede's annual yield be allocated to Nevada M&I use, 6,000 acre-feet to California M&I use, and 6,300 acre-feet to fishery uses, or a total of 29,200 acre-feet.

Shortly thereafter, the Definite Plan Report prepared by the Bureau provided that Stampede would supply 45,800 acre-feet for M&I purposes on a divertible basis, including 29,200 acre-feet on a depletable basis, for parts of the Truckee River basin in California, and for the Reno-Sparks area in Nevada.

In 1966, when the Bureau was about to start constructing Stampede, two developments threatened to delay construction. First, it appeared that a 1926 contract between the United States and the Truckee-Carson Irrigation District would have to be revised and approved by Congress before water from the Truckee could be diverted and distributed by the plaintiffs. Second, the Commissioner of the Bureau of Indian Affairs informed the Secretary that the Project did not provide adequate safeguards to protect the Pyramid Lake Indians' interest in preserving the lake and its fishery. The Tribe had withdrawn an initial objection to the Washoe Project when the Secretary assured the Tribe that 215,000 acre-feet of water would enter Pyramid Lake once the Project was operating. Studies completed in 1966 did not support this estimate.

Without executing a contract with the District, the Secretary commenced construction because he concluded that there was an immediate need for flood control protection for both the Boca Dam and the Reno-Sparks area. The Secretary directed that until the water rights prob-

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[3] An acre-foot is a unit used to measure water storage; it means the amount of water contained by a one-acre surface area one foot deep.

lems were resolved, the dam and the reservoir would be used for flood control, fish and wildlife benefits, and recreation.

In 1967, the Secretary declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.Reg. 4001 (1967). In 1975, the Lahontan cutthroat trout, which had already been declared to be an endangered species, was declared to be threatened with extinction. 40 Fed.Reg. 29863 (1975). This action was taken because the reduced flow of water resulting from the diversion of water at the Derby Dam had eliminated much of its spawning run.

In 1969, the Secretary notified the District that he no longer intended to operate Stampede for M&I purposes and that until legal rights to the water were settled he would operate it only for "flood control, recreation, and fish and wildlife benefits . . ."

In *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D.Nev. 1977), (*U.S. v. T.C.I.D.*) the district court rejected the demand of the government for reserved water rights for the Pyramid Lake Paiute Indians for fishery purposes. On appeal, this holding was partly reversed and the case was remanded to the district court for further proceedings. 649 F.2d 1286 (1981). The defendants in this case contend that *U.S. v. T.C.I.D.* may have a collateral estoppel effect on the water rights to be considered here.

This case raises a number of issues. In the first phase, I shall consider those issues that require no factual findings. They are:

(1) Do plaintiffs have standing to challenge the Secretary's action?

(2) Do the plaintiffs have a private right of action under the reclamation laws?

(3) Is the government required to obtain a reimbursement contract? If so, can reimbursement

be achieved through a contract to supply M&I water to the District?

(4) Is the state of Nevada entitled to a declaratory judgment on the issue of whether the Secretary's present operations of Stampede require a permit from the Nevada State Engineer?

I. STANDING

The defendants contend that plaintiffs Sierra Pacific and the District lack standing to challenge the Secretary's operations of Stampede because: (1) the plaintiffs cannot show that they have suffered actual or threatened injury as a result of the Secretary's conduct, which injury would be redressed by a favorable decision, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1697, 60 L.Ed.2d 66 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); and (2) plaintiffs are not members of the class for which the reimbursement provisions of the reclamation laws are designed to benefit. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975).

To satisfy the first requirement, the plaintiff's interest in the outcome of the action must be unique or special; a simple taxpayer's interest in the lawful use of his revenues is insufficient. *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). The plaintiff's interest may not be "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205.

The Secretary is under no obligation to contract with a particular entity for the distribution of reclamation water, and in theory may contract with any organization which satisfies the requirements under the reclamation laws. Here, there are no other entities in the Truckee Meadows area seeking the right to distribute Stampede

water. The District was created for the express purpose of buying this water from the Stampede Reservoir. Therefore, the injury is sufficiently specific to trigger standing.

In *Bryant v. Yellen*, 447 U.S. 352, 367, 100 S.Ct. 2232, 2240, 65 L.Ed.2d 184 (1980), the Secretary of the Interior sued the Imperial Irrigation District to enforce an "excess lands" provision. This provision limits each recipient of federal reclamation water to a maximum of 160 acres of land, and requires the owners of larger parcels to sell excess lands at below-market prices. The District Court held against the Secretary, and the Secretary decided not to appeal. Imperial Valley residents sought leave to intervene for the purpose of appeal. The Supreme Court held that the residents had standing to appeal based upon their allegations that (a) the plaintiffs lived in the Valley, (b) they were farm workers who did not own farmland, (c) they desired to purchase excess lands irrigated with reclamation water, and (d) those excess lands would have been sold at below-market prices.

The Washoe Project was designed to develop scarce water resources to be sold to water users in the area. The Secretary has refused to sell the Project's water, which the plaintiffs want to buy. A judgment ordering the Secretary to seek repayment contracts will almost certainly benefit the plaintiffs because they are the only entities in the area with the ability to purchase the water. Their claim of a particularized injury is stronger than that of the plaintiffs in *Yellen*, and is sufficient to give them standing to maintain this action.

I therefore hold that plaintiffs have standing to maintain this action.

II.

PRIVATE RIGHT OF ACTION UNDER THE RECLAMATION LAWS

Defendants contend that even if plaintiffs satisfy the standing requirements, the reclamation laws that govern the Secretary's actions are not enforceable by private parties. Plaintiffs assert that under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), private parties may enforce the Secretary's obligation to obtain partial reimbursement for the construction costs of Stampede. Plaintiffs also assert that the courts have the authority to compel the Secretary to comply with the reimbursement obligation.

Reclamation funds are proceeds of public lands which are reinvested to construct projects that are too expensive for private interests or states to finance. *Swigart v. Baker*, 229 U.S. 187, 197, 33 S.Ct. 645, 647, 57 L.Ed. 1143 (1913). Reclamation funds are continually reinvested for projects which eventually pay for themselves. The Reclamation Project Act of 1939, 43 U.S.C. § 485h (1976), set out procedures which the Secretary must follow to obtain authorization for new projects. Section 485h(a) prohibits expenditures for any new project unless the Secretary has submitted to Congress a feasibility report which includes estimates of the project cost and the portion to be paid by water users. When probable repayments exceed costs, the project is automatically authorized. But when expected payments fall short of project costs, the Secretary cannot proceed without specific Congressional authorization.

The Washoe Project Act incorporates the overall Congressional plan for the Truckee and Carson Rivers. The Project was originally designed to be 86% reimbursable, and was primarily intended to benefit water users in the area. Section 2(c) of the Act requires the Secretary to

obtain repayment contracts before delivering any water.[4] 43 U.S.C. § 614a(c) (1976). Other sections of the Act limit the Secretary's authorization to build recreation or fish and wildlife facilities. 43 U.S.C. §§ 614b, 614c (1976). Congress intended that the Secretary obtain repayment for the costs of the Project, except for amounts specifically allocated to nonreimbursable functions. The committees which studied the Project assumed that water users would repay most of the Project's cost, and the legislative history of the Washoe Project Act supports this view.

Federal courts may review the Secretary's actions to ensure that he exercises his authority over federal waters within the statutory constraints. *Arizona v. California*, 373 U.S. 546, 584-5, 590, 83 S.Ct. 1468, 1489-90, 1492, 10 L.Ed.2d 542 (1963). In *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976), an association of consumer-owned utilities brought an action to compel the Secretary to sell them surplus power from the Central Arizona Project. The reclamation laws required the Secretary to give preference to municipalities and public corporations for power sales. 43 U.S.C. § 485h(c). Instead, the Secretary sold the power to private companies. The Ninth Circuit held that the Secretary did not have unfettered discretion to operate the project, and that the Secretary could not disregard the preference provision unless the preference would impair the efficiency of the project for irrigation purposes.

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[4] Section 2(c), codified at 43 U.S.C. § 614a(c), provides:

> [T]he Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title, which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments.

The court in *Arizona Power Pooling* reviewed the Secretary's actions under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1976). Section 702 grants a right of judicial review to any person adversely affected or injured by agency action, except when (a) the statute itself expressly precludes judicial review, or (b) "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976).

The defendants here contend that exception (b) applies because the Secretary has wide discretion in carrying out reclamation operations. To restrict judicial review requires "clear and convincing evidence" of legislative intent. *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970). In *Arizona Power Pooling, supra*, 527 F.2d at 727, the court stated:

> [T]he "committed to agency discretion" exception is a very narrow one which is applicable only in "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed. 2d 136 (1971).]

Here, the reimbursement provision restricts the Secretary's authority. Without judicial review, there is no mechanism to enforce Congressional instructions. *See City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978); *cf. Arizona Power Authority v. Morton*, 549 F.2d 1231 (9th Cir. 1977), *cert. denied*, 434 U.S. 835, 98 S.Ct. 124, 54 L.Ed.2d 97 (review denied because broad statutory grant of discretion brought Secretary's actions within the agency discretion exception).

I hold that plaintiffs have a private right of action under the reclamation laws.

III.

AUTHORIZATION TO SELL WATER FOR M&I USES

Defendant-intervenor Pyramid Lake Paiute Tribe of Indians denies that the Secretary has an obligation to obtain reimbursement for the costs of Stampede. The Tribe also contends that the Secretary is not authorized to sell Stampede water for M&I uses. The Tribe bases its argument on the legislative history of the Washoe Project Act.

The Washoe Project Act does not mention M&I uses, but it does authorize the use of Stampede water for irrigation, drainage, storage, flood control, hydroelectric power, fish and wildlife, and "other beneficial purposes." 43 U.S.C. § 614. The Tribe argues that in spite of this broad language, Congress in 1955 specifically considered and rejected M&I water for Reno and Sparks. This contention is based on the feasibility report,[5] which permitted M&I water for other communities in the area. I question this conclusion because another passage of the report assumed that the population of Reno and Sparks, which now exceeds 140,000, would reach only 70,000 by the year 2000.

The need for more M&I water became apparent a few years after the enactment of the Washoe Project Act. The Bureau studied that need and concluded that the Definite Plan Report for Stampede authorized M&I uses. In 1963, the Bureau's Solicitor came to the same conclusion. In 1964, a special task force of the Interior Department recommended that Stampede water be sold for M&I uses. These interpretations by the agency charged with the administration of a project are entitled to deference. *California v. United States*, 438 U.S. 645,

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[5] The feasibility report is incorporated into the legislative history of the Washoe Project Act as H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955).

676 n.30, 98 S.Ct. 2985, 3001 n.30, 57 L.Ed.2d 1018 (1977); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735-6, 70 S.Ct. 955, 960-61, 94 L.Ed. 1231 (1949).

The Tribe also contends that the Water Supply Act of 1958, 43 U.S.C. § 390b(d), requires the Secretary to obtain Congressional approval before selling Stampede water for M&I uses. That Act prohibits modifications "which would seriously affect the purposes for which the project was authorized," unless Congress approves. The Tribe's argument assumes that M&I uses were not authorized by the Washoe Project Act, an assumption which I have already rejected.

The Secretary originally agreed with the Tribe; however, he now concedes that he is obligated to obtain reimbursement for the costs of Stampede, and that he is authorized to sell Stampede water for M&I uses. Nevertheless, the Secretary asserts that the District cannot compel the sale of M&I water without his determining the amount of water needed to satisfy the other purposes of the Washoe Project, or until the Tribe's water rights are settled and the endangered species are adequately protected. I have reserved decision on the effect of these rights and obligations for phase two of this litigation.

The Secretary also asserts that he may operate Stampede as he deems appropriate until Congress enacts new legislation. This litigation is primarily the result of the Secretary's failure to sign the Stampede Addition. Congressional hearings indicate that legislators are awaiting the decisions in this and related cases before enacting new legislation. Finally, the Secretary may not refuse to obtain repayment now merely because future events may provide other and even preferable sources of repayment.

Plaintiffs seek a judgment directing the Secretary to execute the Stampede Addition to the Repayment Con-

tract. Events since 1966 may have rendered the terms of that contract inappropriate. I therefore hold that the Secretary is obligated to sell all of the Stampede waters not required to fulfill his obligations under the Endangered Special Act and the Tribe's reserve water rights.

IV.

STATE WATER APPROPRIATION PERMITS

The State of Nevada seeks a declaration requiring the Secretary to obtain a permit from the Nevada State Engineer for Stampede's present operations. The State of California has issued two permits that authorize the storage of the Little Truckee River waters at Stampede. These waters are now captured, impounded, and released in California. None of this water is diverted from the natural channel of the Truckee River in Nevada.

In 1968, the Secretary applied to the Nevada State Engineer for a permit to appropriate water for M&I irrigation, and fish and wildlife purposes. Because the amount of water which would be appropriated for each use was uncertain, the Nevada State Engineer deferred action on these applications. These applications have not yet been granted or denied.

Section 533.325 of the Nevada Revised Statutes (NRS) provides that all persons who appropriate water in the State of Nevada for beneficial purposes must obtain water permits from the Nevada State Engineer. "Persons" is defined to include the United States. NRS 533.010.

In *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), the Supreme Court held that the United States was required to obtain permits from the State of California to operate a federal reclamation project and to comply with all conditions imposed by the State which are consistent with Congressional directives. *Id.* at 676, 98 S.Ct. at 3001.

The Secretary concedes that a permit is necessary in order to divert water for M&I or irrigation purposes in the State of Nevada. However, the Secretary points out that none of the Bureau's present activities take place in Nevada. The Bureau releases water in California which flows into Nevada and empties into Pyramid Lake. There is no diversion or appropriation of water as those terms are commonly understood. Section 533.335(5) of the Nevada Revised Statutes supports this interpretation. That section requires a permit application to provide "a substantially accurate description of the location of the place at which the water is to be diverted from its source. And, if any water is to be returned to the source, . . . a description of the location of the place of return." Here, no water is diverted from its natural channel, and no diverted water is returned, so there can be no locations to describe, as required by this section. This interpretation is also supported by NRS 533.445, which provides that a reservoir manager need only give notice to the State Engineer when he intends to use the bed of a stream to carry stored water.

I hold that under Nevada law, "appropriation" means an actual diversion from the source, and therefore no permit is required for Stampede's present operations.

V.

CONCLUSIONS

I hold that the plaintiffs have standing to maintain this action, and that they have a private right of action under the Administrative Procedure Act to enforce the Secretary's reimbursement obligation. The Secretary is required to sell all of Stampede's water except that which is necessary to fulfill his trust obligations to the Tribe and to protect the endangered species which spawn in the Lower Truckee River.

I also hold that the Secretary needs no permit from the State of Nevada for Stampede's present operations.

APPENDIX D

UNITED STATES DISTRICT COURT,
D. NEVADA

No. CV-R-76-152-GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,
Plaintiffs,

v.

JAMES G. WATT, SECRETARY OF INTERIOR, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

Oct. 4, 1982

OPINION

SOLOMON, District Judge:

This is an action to compel the defendant, the Secretary of the Interior (Secretary) to store water in the Stampede Reservoir for the benefit of plaintiffs, and to compel the Secretary to enter into a contract with plaintiffs for plaintiffs to reimburse the United States government (government) for the costs of the Stampede Dam and Reservoir (Stampede).

Carson-Truckee Water Conservancy District, Sierra Pacific Power Company, and the State of Nevada, plaintiffs, filed this action against the Secretary and several bureau chiefs in the Department of Interior. The Pyramid Lake Paiute Tribe of Indians (Tribe) intervened as a defendant.

Stampede Dam was completed in 1970. Since that time, the Secretary and the Bureau of Reclamation have oper-

ated Stampede only for fishery development, flood control, and recreation. Plaintiffs contend that under the Washoe Project Act,[1] the Secretary is required to operate Stampede for reimbursible [*sic*] reclamation purposes such as irrigation, power generation, and municipal water supply.

In an earlier opinion,[2] I held that (1) the plaintiffs have standing to maintain this action, (2) plaintiffs have a private right to action under the Administrative Procedure Act, 5 U.S.C. § 702, to enforce the Secretary's obligation to obtain reimbursement for the construction costs of Stampede, (3) the Secretary must sell all of Stampede's water except the amount necessary to fulfill his trust obligations to the Tribe and to protect the endangered and threatened species which spawn in the Lower Truckee River, and (4) under Nevada law, the Secretary needs no permit from the Nevada State Engineer for Stampede's present operations. I reserved decision on the amount of water which the Secretary must provide (1) to satisfy his obligations under the Endangered Species Act[3] to conserve the endangered and threatened species of Pyramid Lake, and (2) to satisfy his trust obligations to preserve the Pyramid Lake fishery for the benefit of the Tribe.

I.

FACTS AND PROCEDURAL HISTORY

The Little Truckee River flows from the mountains of eastern California, through the Stampede Dam and Reservoir and Boca Dam, where it joins the Truckee

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[1] Pub. L. No. 84-858, 70 Stat. 775 (1956) (codified at 43 U.S.C. §§ 614-614d).

[2] *Carson-Truckee Water Conservancy District, et al. v. Watt and Pyramid Lake Paiute Tribe of Indians*, 537 F.Supp. 106 (D. Nev. 1982).

[3] Pub. L. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1543), as amended.

River. The Truckee River flows into Nevada through Reno and Sparks, and empties into Pyramid Lake.

Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation. The reservation consists of 322,000 acres which was set aside in 1859, and confirmed by executive order in 1874. One of the purposes of the reservation was to enable the Tribe to take advantage of the Pyramid Lake fishery, which among other things includes a native species of cutthroat trout, and the cui-ui fish, which exists nowhere else.

In 1902, Congress passed the Reclamation Act The Secretary then withdrew land for the Newlands Reclamation Project. Most of the land was in the Carson River basin in Nevada. The Newlands Project was designed to divert water from both the Carson and Truckee Rivers for irrigation and storage.

The government claimed the right to all unappropriated water in the Truckee River, and constructed the Derby Dam on the lower Truckee River to divert water from that river below Reno into the Lahontan Reservoir.

In 1913, the government filed an action, *United States v. Orr Water Ditch Co., et al.*, against all water users along the Truckee River to quiet title to the water rights of all parties. The government claimed a small amount of water to irrigate lands on the Pyramid Lake Reservation, and claimed the rest of the water for the Newlands Project. The government did not claim water for the Pyramid Lake Fishery.

After the *Orr Ditch* decree was entered, the government contracted with the Truckee-Carson Irrigation District (TCID) to provide water for the Newlands project. Soon thereafter the level of the Lake began to drop,[4] and

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[4] Pyramid Lake loses approximately four feet per year, or 440,000 acre-feet, through evaporation and seepage. It receives approximately 55,000 acre-feet per year in precipitation and run-off from small streams, and the rest from the Truckee River. Water diverted

a delta was exposed at the mouth of the Truckee River which in most years was too shallow for the fish to pass upstream to their spawning grounds. Another problem related to the temperature of the water. Lahontan cutthroat trout require cooler water for spawning, available only above the Derby Dam. The Dam had a fish ladder, but it did not work well, and it eventually collapsed.

By 1938, the level of the Lake dropped 40 feet. Soon thereafter the cutthroat trout became extinct. By spawning along the edges of the Lake where the fresh Truckee River water entered, the cui-ui[4] barely survived.

In the 1940's the State of Nevada began to stock the Lake with cutthroat trout from nearby lakes and rivers.[5] In 1956, Congress appropriated funds to restore the fishery under the Washoe Project Act. That Act also provided for the construction of Stampede Dam for flood control, irrigation, power generation, development of fish and wildlife resources, storage against drought, and "other beneficial purposes", 43 U.S.C. § 614, including Municipal and Industrial (M & I) uses.

Disputes over water rights on the Truckee River delayed the construction of Stampede. Finally, in 1970, it was built because of an immediate need for flood control protection for the Reno-Sparks area.

In 1967, the Secretary declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.

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for irrigation in the Newlands Project does not return to the river, unlike the water diverted above the Derby Dam.

[5] The genetic composition of the original Pyramid Lake cutthroat trout is unknown. However, from 1890 to 1932 hundreds of millions of eggs were taken from the Pyramid Lake trout and used for stocking streams and lakes in Nevada and other states. It is probable that descendants of these fish were used to restock Pyramid Lake. Expert testimony indicates that the trout now living in Pyramid Lake are genetically similar to the original population.

Reg. 4001 (1967). In 1975, the Secretary declared the Lahontan cutthroat trout to be "threatened with extinction". 40 Fed. Reg. 29863 (1975).

In 1976, the Marble Bluff Dam and Fishway were completed. This fishway enables fish to bypass the delta and reach their spawning grounds. Releases of water from Stampede have not only helped provide the flows for the fishway, but have also provided cooler temperatures needed to trigger the spawning instinct.[6]

In *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D. Nev. 1977) (*T.C.I.D.*), the district court rejected the government's demand for reserved water rights for the Tribe's fishery. On appeal, this holding was partly reversed and the case was remanded. 649 F.2d 1286 (1981). The Court of Appeals held that (1) the Reclamation Act of 1902 did not authorize the Secretary to take Indian reserved water rights and use them to benefit the Newlands Project, 649 F.2d at 1298, (2) the *Orr Ditch* defendants and subsequent appropriators who relied upon the *Orr Ditch* decree could assert a defense of res judicata against T.C.I.D. and the Tribe, who were represented by the government, and (3) the Tribe was not precluded by res judicata from asserting rights against T.C.I.D., because the government did not adequately represent the interests of the Tribe in the *Orr Ditch* case.

The water right at issue in *T.C.I.D.* is vast,[7] and any water the Tribe is awarded on remand in *T.C.I.D.* may

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[6] The water temperature problem was aggravated in the 1940's when the Army Corps of Engineers removed a riparian shade canopy which grew along the banks of the lower Truckee River. Since 1970, the Secretary has been releasing Stampede water only during the spawning season (roughly, mid-March through June), in order to keep the water in the lower Truckee River cool enough for the fish to spawn there.

[7] The Newlands Project was given the rights to sufficient water to irrigate 232,000 acres of land assuming 3.5 acre-feet of water per acre of land, plus water lost in transportation. In comparison,

substantially diminish the amount of water required to satisfy the Tribe's claims here.

The parties disagree on whether the Court in *T.C.I.D.* expanded the amount of water which the government may claim from subsequent appropriators. Even if the amount of water is expanded, there is no overlap of issues which might cause collateral estoppel problems here because (1) plaintiff Carson-Truckee Water Conservancy District (Carson-Truckee) was not a party in *T.C.I.D.*, and (2) if the Tribe wins on remand in *T.C.I.D.*, there may be less water available for Stampede storage, but it will not affect the Secretary's obligation to store and sell to plaintiffs any water remaining after the *T.C.I.D.* obligations have been satisfied.

II.

ISSUES

The plaintiffs do not deny that the Secretary has obligations to the Tribe and under the Endangered Species Act which take precedence over his obligation to store water for municipal and industrial (M & I) use. However, plaintiffs contend that the amount of water necessary to fulfill those obligations is small, and that there is sufficient water for M & I storage after the water requirements under the Endangered Species Act have been satisfied.

The government and the Tribe contend that the Endangered Species Act requires the government to supply the fishery with sufficient water to get the species off the threatened and endangered lists. They contend that this goal requires more water than the entire yield of the Stampede Reservoir.

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the total storage capacity of Stampede Reservior is only 225,000 acre-feet. Currently, only 65,000 acres of the Newlands Project are being irrigated.

The government and the Tribe also contend that the plaintiffs already have enough water from other sources, and that they do not need any more water from Stampede. They also contend that the relief which plaintiffs seek is precluded by

(1) the Secretary's trust obligations to the Tribe, which is an issue also present in *T.C.I.D.*,

(2) the Secretary's failure to conduct a consultation as required by 16 U.S.C. § 1536,

(3) the absence of an Environmental Impact Statement, and

(4) the plaintiffs' lack of a Nevada water appropriation permit.

III.

THE ENDANGERED SPECIES ACT

Section 2(c) of the Endangered Species Act, 16 U.S.C. § 1531(c), requires that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."

Section 2(b) of the Act, 16 U.S.C. § 1531(b), states in part:

> (b) The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species, . . .

The term "conserve" is defined in Section 3(2) of the Act, 16 U.S.C. § 1532(2):

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endan-

> gered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.

Plaintiffs contend that the Endangered Species Act does not prevent the Secretary from operating Stampede for M & I uses unless that operation would jeopardize the existence of the cui-ui fish and the Pyramid Lake Lahontan cutthroat trout. The defendants on the other hand contend that the Secretary has an obligation under the Act to replenish the species so that they are no longer endangered or threatened with extinction.

Specifically, the plaintiffs contend that:

(1) the Secretary is only obligated to avoid jeopardizing the bare survival of the species,

(2) the Secretary may refuse to store water for M & I use only if there is an "irresolvable conflict" between M & I storage and the bare survival of either species, and

(3) the Secertary must use other available methods to conserve the fish in order to store more water for M & I use.

The plaintiffs rely on section 7(a)(2) of the Act, as amended, 16 U.S.C. § 1536(a)(2), which states in part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Plaintiffs contend that this language permits federal agencies to supply only that amount of water necessary

to prevent the extinction of endangered species. I disagree.

The Supreme Court has held that the Act gives endangered species the highest priority over all federal projects. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), the Court enjoined the completion of the Tellico Dam in order to prevent the extinction of the snail darter fish, whose critical habitat would be destroyed by the dam. At the time the injunction was issued, the dam was almost completed, and the loss to taxpayers was estimated at more than 50 million dollars. The Supreme Court reviewed the legislative history of the Endangered Species Act, and concluded that Congress regarded the value of endangered species to be "incalculable". *Id.* at 187, 98 S.Ct. at 2298. "The plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." *Id.* at 184, 98 S.Ct. at 2296 (emphasis added). In enacting the Endangered Species Act, Congress has made "a conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185, 98 S.Ct. at 2297.

Both of the cases on which plaintiffs rely, namely, *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976) and *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *rehearing denied*, 532 F.2d 1375, *cert. denied*, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587, were decided before *T.V.A. v. Hill*. In *Sierra Club*, environmentalists sued to enjoin the construction of a dam which would flood some caves where an endangered species of bats lived. The district court denied relief, and the court of appeals affirmed. The evidence there showed that only a tiny part of the endangered bats might be affected. In *Coleman*, the court held that construction of a highway which would destroy only a tiny part of the critical habitat of the Sandhill Crane was permissible if it would not jeopardize the existence of that species. The court remanded for further findings on that question.

Even assuming that these decisions do not conflict with *T.V.A. v. Hill*, they do not apply here. In both cases, the district court found that the proposed agency action would not jeopardize the existence of an endangered species. In both cases after consultations with the Secretary as required by 16 U.S.C. § 1536, the agency decided to go ahead with the project.

Here, there is no proposed agency action and no consultation with the Secretary. There is substantial evidence that plaintiffs' proposal would jeopardize the existence of the species.

The defendants rely on *Defenders of Wildlife v. Andrus*, 428 F.Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F.Supp. 1037 (W.D. Tex. 1978). Both involve challenges to the Secretary's hunting regulations. The plaintiffs in *Defenders of Wildlife* successfully challenged regulations which permitted hunting during twilight hours, when endangered species of birds could not be distinguished from game species. In *Connor*, the court set aside the Secretary's regulation prohibiting all duck hunting because it was arbitrary. However, both cases held that:

> [The Secretary] must do far more than merely avoid the elimination of protected species. [He] must bring these species back from the brink so that they may be removed from the protected class, and [he] must use all methods necessary to do so.

Defenders of Wildlife, 428 F.Supp. at 170; *accord, Connors*, 453 F.Supp. at 1041.

In my view this standard applies under the Endangered Species Act, and the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and Lahontan cutthroat trout are no longer classified as endangered or threatened.

THE PYRAMID LAKE RESTORATION PROGRAM

The Secretary must store all water not required under the Endangered Species Act to conserve the Pyramid Lake fishery, but the amount of water available must be determined on the basis of the evidence. The Secretary's finding on the amount of water necessary for the fishery is entitled to deference. Under the Administrative Procedure Act, 5 U.S.C. § 706(2),[8] the standard of review is narrow. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). If the Secretary acted within his statutory authority, the test is whether his action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

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[8] 5 U.S.C. § 706 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Secretary is conducting a program to restore the cui-ui to a non-endangered status by developing a population which is self-sustaining through natural reproduction. He also seeks to restore the Pyramid Lake Lahontan cutthroat trout population to the point where it is no longer a threatened species. The timely release of water flows from Stampede are essential to this program.

Substantial evidence supports the Secretary's plan for operating Stampede.

A. *Water Requirements of the Cui-ui.*

All the parties concede that the cui-ui are an endangered species, and that the cui-ui are important to science as the only pure species remaining in the genus Chasmistes.

Until recenty, little was known about the life-cycle of the cui-ui. The spawning population appears at the river delta and fishway between mid-March and mid-April, depending on the volume of water entering the Lake. Upstream migration begins in May and lasts until mid-June, if the flows are sufficient. Unlike other species, the cui-ui do not die after spawning; they return to the Lake. Their eggs hatch in one to two weeks, depending on the water temperatures. Even the experts do not know the amount of time that the larval cui-ui spend in the river before returning to Pyramid Lake.

The temperatures in the River depend on the flow—the greater the volume during the spawning season, the lower the temperatures. The cui-ui restoration program requires large flows during the spawning season for three reasons:

(1) Large flows attract the spawning population to the mouth of the Pyramid Lake fishway, where they are captured for the Tribe's cui-ui hatchery. If the flows are not maintained over a period of several weeks before migration, the spawners will disperse and reabsorb their eggs.

(2) The cooler the river temperatures, the higher the migration, hatching, and survival rates of the larval cui-ui.[9]

(3) Without adequate water depth the spawners and larval cui-ui may be stranded in the river and die before they return to Pyramid Lake.

B. *Water Requirements of the Lahontan Cutthroat Trout*

The Lahontan cutthroat trout cannot spawn naturally in the Truckee River because they require lower temperatures and faster currents than the cui-ui. Their natural spawning grounds are inaccessible because the trout migration is blocked by the Derby Dam.

Like the cui-ui, the trout do not die after spawning. The young trout remain in the river for up to two years before returning to Pyramid Lake.

Access to the upper Truckee River is now blocked; therefore the trout population is being sustained by several hatcheries. The trout are captured in the fishway, to insure that only fish who attempt to migrate will reproduce. Large quantities of cool water are necessary to attract the spawners into the fishway.

I find that the releases of water from the Stampede Reservoir are necessary for the hatcheries to produce spawning Lahontan cutthroat trout that are adapted to their environment.

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[9] In warmer temperatures the fish are more susceptible to disease and the eggs are susceptible to fungus. Studies conducted by Dr. David Koch, one of the defendants' experts, show that the ideal temperature for larval cui-ui survival is 57 degrees. Although the design of his experiment did not duplicate natural conditions, the evidence showed that the plaintiffs' proposal to maintain a river temperature of approximately 68 degrees would permit only a small percentage of cui-ui to survive.

PLAINTIFFS' PROPOSAL FOR OPERATING STAMPEDE

For plaintiffs to be able to serve new M & I users, they must have enough water in storage to insure a steady supply in drought years. The plaintiffs' plan would require the release of M & I water in small quantities, and most of the total annual M & I releases would occur outside the spawning season, when it would not help increase the fish population.

Water releases for the fishery in a single year may require all of the Stampede storage, leaving no reserve for M & I users in drought years. In my view, it is not feasible to operate Stampede for both M & I and fishery purposes.

Plaintiffs concede that it is unlikely that the fish population of Pyramid Lake will increase substantially under their proposal for operating Stampede. The plaintiffs' plan would reduce the average river flow during the spawning season 20% below the level which existed before Stampede was built. This amount is inadequate to meet the Secretary's obligation under the Endangered Species Act. Before Stampede was built, there was not enough water for the cui-ui, and the cui-ui were practically extinct. The plaintiffs' proposal does not meet their own standards because it would jeopardize the existence of the cui-ui and hasten their extinction.

OTHER CONTENTIONS

A. *Consultation Requirements*

The plaintiffs are proposing a plan which would modify the critical spawning habitat of the cui-ui and the Lahontan cutthroat trout. The defendants point out that even if the Secretary was willing to adopt this plan, he could not do it without first satisfying the consultation procedures in 16 U.S.C. § 1536. That section requires the

Secretary to provide an opinion showing what effect his proposed plan of action would have on the species or habitat, to insure that it "is not likely to jeopardize the continued existence of any endangered species or threatened species."

There was no consultation here because there was no proposed agency action. I know of no authority authorizing a court to order a federal agency to take action affecting an endangered species without first satisfying the consultation requirements.

B. *Lake Level Requirements and Conservation Methods*

The defendants contend that Pyramid Lake must be maintained at its present level to prevent the concentration of total dissolved solids from making the Lake uninhabitable for fish. Defendants also contend that the plaintiffs can meet their anticipated water needs through conservation and other sources.

It is not necessary to consider these contentions, because I have held that the Secretary's operation of Stampede for the benefit of the endangered and threatened species of Pyramid Lake is not an abuse of discretion. Nevertheless, I note that these additional contentions are without merit. Under the plaintiffs' proposal, the average annual volume of water entering Pyramid Lake would be about the same,[10] even though the water would enter at different times. The plaintiffs' water needs are irrelevant because I have already held that the Washoe Project Act created an enforceable obligation on the part of the Secretary to obtain reimbursement for the construction costs of Stampede, and this obligation

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[10] Plaintiffs estimate that under their proposed plan, only 11,000 acre-feet per year would be lost from the system through M & I use. The rest would return to the Truckee River. Pyramid Lake requires approximately 285,000 acre-feet from the Truckee River to maintain a constant level.

is superseded only by the Endangered Species Act and the Tribe's fishery rights.

Similarly, there is no merit in plaintiffs' contention that the Secretary must use other available methods to conserve the fish which would permit more water to be stored for the plaintiffs' benefit. These methods would include the restoration of a riparian shade canopy along the river below the Derby Dam, the confinement of the River to a single channel, the transplantation of the cui-ui to a different habitat, and the construction of more hatcheries. Plaintiffs failed to produce evidence to show the feasibility or cost of these projects.

I find it was plaintiffs' burden to show the Secretary has abused his discretion. Plaintiffs seek to enforce the reimbursement provisions of the Washoe Project Act. Yet their proposal may require the Secretary to spend huge sums to conserve the fish, in order to sell them extra water. This proposal could very well defeat the purpose of the Act's reimbursement provisions, which is to maintain a large reclamation fund for continuous reinvestment in new projects.

I find that the plaintiffs have failed to show that the Secretary is abusing his discretion.

IV.

TRUST OBLIGATIONS TO THE TRIBE

In *T.C.I.D.*, the court held that one of the purposes of establishing the Pyramid Lake Reservation in 1859 was "to enable the Tribe to take advantage of the Pyramide Lake fishery, then consisting of a native species of cutthroat trout, and the cui-ui, . . ." *T.C.I.D.*, *supra*, 649 F.2d at 1290.

The amount of water necessary to satisfy the Tribe's fishery rights is disputed both in *T.C.I.D.* and in this case. The Tribe elected not to present any evidence on

this issue, but urges this court to allow the Secretary to use Stampede for the benefit of the fishery until the final judgment in *T.C.I.D.* determines the Tribe's rights.[11] The plaintiffs oppose the Tribe's request and seek an order requiring the Secretary to sell them water now on the ground that they would be entitled to the same percentage of any remaining storage in Stampede regardless of the holding in *T.C.I.D.*

In my view it is premature for me to determine this issue before *T.C.I.D.* is decided. Because I am holding that the Endangered Species Act requires the Secretary to use Stampede for the fishery, Stampede storage will not be available for M & I uses until the cui-ui and Lahontan cutthroat trout are no longer threatened or endangered. This may take many years. The fishery rights at issue here are intimately connected with issues that must be decided in *T.C.I.D.*, a case which has many parties including all of the parties in this case other than Carson-Truckee Water Conservancy District. Until *T.C.I.D.* is decided, the Secretary's trust obligations to the Tribe will not be known.

V.

OTHER ISSUES

I do not reach the question whether the Secretary requires an Environmental Impact Statement to enter into a repayment contract because I am holding that the Secretary is properly operating Stampede to conserve the threatened and endangered species of Pyramid Lake. I also do not reach the question whether the plaintiff's may claim rights as "subsequent appropriators" under the *T.C.I.D.* decision, because I will abstain from determining the Tribe's reserved fishery rights.

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[11] The pretrial order in this case barely mentioned the trust obligations, because at the time the pretrial order was entered, the Ninth Circuit had not yet overturned the district court's holding that the Reclamation Act extinguished the Tribe's fishery rights.

VI.

CONCLUSION

All of the claims asserted by the plaintiffs are denied and the Secretary is entitled to a judgment dismissing plaintiffs' action and holding that his operation of Stampede for the benefit of the Pyramid Lake cui-ui fish and the Lahontan cutthroat trout is reasonable and proper and does not constitute an abuse of discretion.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

[Filed Oct. 26, 1982]

JUDGMENT

Based on the Findings of Fact and Conclusions of Law contained in the Court's opinion dated October 4, 1982,

IT IS ORDERED AND ADJUDGED THAT:

1. The Secretary of Interior's decision not to sell Stampede water for municipal and industrial purposes to the plaintiffs was in accord with the Administrative Procedure Act, 5 U.S.C. § 501 et seq., and was not arbitrary, capricious, or an abuse of discretion.

2. The Secretary of the Interior is ordered to utilize the water stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout.

3. All claims asserted by plaintiffs are denied, and plaintiffs' action is dismissed with prejudice.

Dated this 22nd day of October, 1982.

/s/ [Illegible]
Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 BRT

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-In-Intervention.

MOTION TO AMEND JUDGMENT

The defendant Secretary of the Interior pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves for an amendment of this court's judgment which was entered on October 27, 1982, to include a provision which recognizes his statutory authority under the Endangered Species Act. A memorandum brief in support of this motion is attached.

Dated this 5th day of November, 1982

Respectfully submitted,

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United States Attorney

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Assistant United States
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/s/ Dale T. White
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APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 BRT

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-In-Intervention.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND JUDGMENT

Statement

The federal defendant, Secretary of the Interior (hereinafter "the Secretary"), seeks an amendment of the court's judgment in this case which was entered on October 27, 1982. That judgment followed an opinion dated October 4, 1982, and the submission by counsel for federal and tribal defendants of proposed judgments.

Discussion

This court has the power under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend a judgment after its entry.[1] *Miller* v. *Leavenworth-Jeffer-*

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[1] The full text of the rule reads:

(e) *Motion to Alter or Amend a Judgment.*

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

son Electric Co-op Inc., 633 F.2d 1378 (10th Cir. 1981); *Mumma* v. *Reading Co.*, 247 F.Supp. 252 (D. Pa. 1965); 6A *Moore's Federal Practice* ¶ 59.12([1] (2d. Ed.). This power is discretionary and "permits the court to correct any error which comes to its attention because of such motion." *Continental Casualty Co.* v. *American Fidelity & Gas Co.*, 186 F.Supp. 173, 178 (D. Ill. 1959), aff'd 275 F.2d 381, amended, 190 F.Supp. 236.

In this case, the Secretary requests modification of the second enumerated paragraph of the judgment which provides that:

> The Secretary of the Interior is ordered to utilize the waters stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout.

This paragraph should be modified so that it does not foreclose possible implementation by the Secretary of Section 1536(b) of the Endanger [*sic*] Species Act, 16 U.S.C. § 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982). This section permits the Secretary to suggest those "reasonable and prudent alternatives" which he believes would not violate § 1536(a)(2) that can be taken by a federal agency after a jeopardy opinion has been issued. It is conceivable that some time in the future some of the waters of the Stampede Reservoir could be utilized under such a reasonable and prudent plan that the Secretary believes would not violate subsection (a)(2) of the Endangered Species Act. The Secretary is concerned that the judgment as it now reads, ordering him to utilize the waters of Stampede Reservoir for the fishery until the fish are no longer classified, might prevent the adoption of such reasonable and pru-

dent alternatives. To clarify this, the Secretary would suggest that paragraph 2 be modified by adding the following sentence: "Nothing in this order is intended to limit the Secretary's statutory authority under 16 U.S.C. §§ 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982)."

Conclusion

For these reasons, the Secretary requests adoption of this clarifying language.

Respectfully submitted,

LAMOND R. MILLS
United States Attorney

SHIRLEY A. SMITH
Assistant United States Attorney

/s/ Dale T. White
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APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

ORDER

IT IS ORDERED THAT:

The motions of Plaintiff Carson-Truckee Water Conservancy District for a new trial and for modification of the findings, conclusions, and judgment is [*sic*] denied.

The motion of the State of Nevada to amend the judgment is denied.

The motion of James G. Watt, Secretary of the Interior, to amend the judgment by adding the sentence:

> Nothing in this order is intended to limit the Secretary's statutory authority under 16 U.S.C. §§ 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982).

is denied. This motion is unnecessary. Nothing in the opinion or judgment directs the Secretary to release more Stampede water than is needed to assure the recovery of the endangered and threatened species of Pyramid Lake. The Secretary's direction is limited by the Endangered

Species Act itself, and nothing in the opinion or judgment limits the discretion of the Secretary in fulfilling his obligations under the Act.

The motion of Defendant-Intervenor Pyramid Lake Paiute Tribe of Indians for costs, expert witness fees, and attorneys' fees is granted but the fees and costs shall be limited to issues under the Endangered Species Act. The Tribe is directed to submit a list of issues for which the Tribe contends it is entitled to fees and costs, under the Endangered Species Act, including those on which the Tribe did not prevail.

The Tribe is not entitled to fees or costs from any of the Federal Defendants.

DATED this 22 day of December, 1982.

/s/ [Illegible]
Judge

APPENDIX I

ENDANGERED SPECIES ACT

§ 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife or plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(Pub. L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub. L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426.)

§ 1532. Definitions

For the purpose of this chapter—

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on March 3, 1973, and the appendices thereto.

(5) (A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is

listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which

protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub. L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 1436 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any

other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(14) The term "plant" means any member of the plant kingdom, including seeds, roots, and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered

species within the foreseeable future throughout all or a significant portion of its range.

(21) The term "United States", when used in a geographical context includes all States.

(Pub. L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub. L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub. L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.)

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened to an endangered species,

he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations

(1) (A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3) (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promtly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C) (i) A petition with respect to which a finding is made under subparagraph (B) (iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B) (i) or (iii) shall be subject to judicial review.

(D) (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5

(relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each country, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for

such a hearing within 45 days after the date of publication of general notice.

(6) (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5) (A) (i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B) (i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B) (ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B) (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A) (i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation,

based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5) or (6) of this subsection nor section 553 of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each States in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation

designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(g) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b) (3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(h) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(Pub. L. 93-205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub. L. 94-359, § 1, July 12, 1976, 90 Stat. 911; Pub. L. 95-632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub. L. 96-159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 2(a), Oct. 13, 1982, 96 Stat. 1411.)

§ 1534. Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquistion and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 U.S.C. 460*l*-4 et seq.], may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

(Pub. L. 93-205, § 5, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95-632, § 12, Nov. 10, 1978, 92 Stat. 3766.)

§ 1535. Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the

Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of fish and wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program—

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secre-

tary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) of this title or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species

of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program—

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endan-

gered and threatened species. The Secretary shall make an allocation of appropriated funds to such States based on consideration of—

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State; and

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species.

So much of any appropriated funds allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that—

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) Review of State programs.

Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) Conflicts between Federal and State laws

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in

any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

(g) Transition

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or (B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to sections 1533(d) and 1538(a)(1)(B) of this title shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State—

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when—

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hear-

ing or comment provisions of section 553 of title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(Pub. L. 93-205, § 6, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95-212, Dec. 19, 1977, 91 Stat. 1493; Pub. L. 95-632, § 10, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96-246, May 23, 1980, 94 Stat. 348; Pub. L. 97-304, §§ 3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426.)

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued exist-

ence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation

within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secre-

tary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that

must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to

be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g) (2) (B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4) (A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5) (A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7) (A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue sub-

penas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be con-

sidered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2) (A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought wth respect to such disposition, the decision resulting after such review. Such application shall set forth for the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governor so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph 3(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556

(other than subsection (b) (1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b) (3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to

the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for any agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and

appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2) (A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by the Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provisions of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purposes of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title or any regulation promulgated to implement either such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iii) of this section shall not be considered to be a taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief Act of 1974 [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section by any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 401 or 402 of the Disaster Relief Act of 1974 [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426.)

§ 1537. International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act

of 1954 [7 U.S.C. 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

(Pub. L. 93-205, § 8, Dec. 28, 1973, 87 Stat. 892; Pub. L. 96-159, § 5, Dec. 28, 1979, 93 Stat. 1228.)

§ 1537a. Convention implementation

(a) Management Authority and Scientific Authority

The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions

The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions; determinations

(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determination and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention

If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife preservation in Western Hemisphere

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State shall act on behalf of and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat.

1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or respon-

sibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

(Pub. L. 93-205, § 8A, as added Pub. L. 96-159, § 6(a)(1), Dec. 28, 1979, 93 Stat. 1228, and amended Pub. L. 97-304, § 5(a), Oct. 13, 1983, 96 Stat. 1421.)

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publica-

tion in the Federal Register of a final regulation adding such fish and wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2) (A) The provisions of subsection (a) (1) of this section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) It is unlawful for any person to engage in business as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants without first having obtained permission from the Secretary.

(2) Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, or plants made by him and the subsequent disposition made by him with respect to such fish, wildlife, or plants;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his places of business, an opportunity to examine his inventory of imported fish, wildlife, or plants and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the

Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons, if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc-4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in his section.

(Pub. L. 93-205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub. L. 95-632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 97-304, § 9(b), Oct. 13, 1982, 96 Stat. 1426.)

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, in-

cluding, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish and wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of

fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc-3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this chapter to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this chapter; or

(C) curtailment of subsistence taking made unlawful under this chapter by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) Notice and review

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this subsection. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) Permit and exemption policy

The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 1531 of this title.

(e) Alaska natives

(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection—

(i) The term "subsistence" includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacking, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened

or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this chapter. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 1373 of this title, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability of provisions; renewal of exemption expiration of renewal certification

(1) As used in this subsection—

(A) The term "pre-Act endangered species part" means—

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing

or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in section 1538(a)(1)(A) of this title.

(B) Any prohibition set forth in section 1538 (a)(1)(E) or (F) of this title.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application—

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to

the applicant a certificate of exemption which shall specify—

(A) any prohibition in section 1538(a) of this title which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.

(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth—

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this chapter. No regulation prescribed by the

Secretary to carry out the purposes of this subsection shall be subject to section 1533(f)(2)(A)(i) of this title.

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 1538(a)(1)(F) of this title.

(B) In the event that this paragraph is held invalid, the validity of the remainder of this chapter, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to—

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 1538(a) of this title prior to July 12, 1976; or

(B) immunize any person from prosecution for any such act.

(8)(A) Any person to whom a certificate of exemption has been issued under paragraph (4) of this subsection may apply to the Secretary for a renewal of such exemption for a period not to exceed three years beginning on the expiration date of such certificate. Such application shall be made in the same manner as the application for exemption was made under paragraph (3), but without regard to subparagraph (A) of such paragraph.

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the original certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(9) (A) The Secretary shall carry out a comprehensive review of the effectiveness of the regulations prescribed pursuant to paragraph (5) of this subsection—

(i) in insuring that pre-Act finished scrimshaw products, or the raw materials for such products, have been adequately accounted for and not disposed of contrary to the provisions of this chapter; and

(ii) in preventing the commingling of unlawfully imported or acquired marine mammal products with such exempted products either by persons to whom certificates of exemption have been issued under paragraph (4) of this subsection or by subsequent purchasers from such persons.

(B) In conducting the review required under subparagraph (A), the Secretary shall consider, but not be limited to—

(i) the adequacy of the reporting and records required of exemption holders;

(ii) the extent to which such reports and records are subject to verification;

(iii) methods for identifying individual pieces of scrimshaw products and raw materials and for preventing commingling of exempted materials from those not subject to such exemption; and

(iv) the retention of unworked materials in controlled access storage.

The Secretary shall submit a report of such review to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on the Environment and Public Works of the Senate and make it

available to the general public. Based on such review, the Secretary shall, on or before October 1, 1983, propose and adopt such revisions to such regulations as he deems necessary and appropriate to carry out this paragraph. Upon publication of such revised regulations, the Secretary may renew for a further period of not to exceed three years any certificate of exemption previously renewed under paragraph (8) of this subsection, subject to such new terms and conditions as are necessary and appropriate under the revised regulations; except that any certificate of exemption that would, but for this clause, expire on or after October 13, 1982, and before the date of the adoption of such regulations may be extended until such time after the date of adoption as may be necessary for purposes of applying such regulations to the certificate. Notwithstanding the foregoing, however, no person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless such person has been issued a valid certificate of exemption by the Secretary under this subsection and unless such product or raw material for such product was held by such person on October 13, 1982.

(g) Burden of proof

In connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) Certain antique articles; importation; port designation; application for return of articles

(1) Sections 1533(d) and 1538(a) and (c) of this title do not apply to any article which—

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 1533 of this title;

(C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before November 10, 1978, any article described in paragraph (1) which—

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 1533 of this title;

(B) was forfeited to the United States before November 10, 1978, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 1540 of this title; and

(C) is in the custody of the United States on November 10, 1978;

may, before the close of the one-year period beginning on November 10, 1978, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this chapter.

(i) Noncommercial transshipments

Any importation into the United States of fish or wildlife shall, if—

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity.

be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this

chapter while such fish or wildlife remains in the control of the United States Customs Service.

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that—

> (i) solely for purposes of section 1536 of this title (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

(Pub. L. 93-205, § 10, Dec. 28, 1973, 87 Stat. 896; Pub. L. 94-359, §§ 2, 3, July 12, 1976, 90 Stat. 911, 912; Pub. L. 95-632, § 5, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 96-159, § 7, Dec. 28, 1979, 93 Stat. 1230; Pub. L. 97-304, § 6(1)-(3), (4)(A), (5), (6), Oct. 13, 1982, 96 Stat. 1422-1424.)

§ 1540. Penalties and enforcement

(a) Civil penalties

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C) or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued

under this chapter may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5 The Secretary may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or

both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c) (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $20,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this

chapter or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this chapter, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) District court jurisdiction

The several district courts of the United States, including the courts enumerated in section 460 of title 28, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) Rewards

The Secretary or the Secretary of the Treasury shall pay a reward from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the perform-

ance of his official duties is ineligible for payment under this subsection.

(e) Enforcement

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

(2) The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this chapter may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this chapter. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the

Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe.

(4) (A) All fish or wildlife or plants taken possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, of any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b) (1) of this section.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the pro-

ceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof.

(f) Regulations

The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this chapter. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of

the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek

any other relief (including relief against the Secretary or a State agency).

(h) Coordination with other laws

The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this chapter with the administration of the animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this chapter or any amendment made by this chapter shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this chapter shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this chapter shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

(Pub. L. 93-205, § 11, Dec. 28, 1973, 87 Stat. 897; Pub. L. 94-359, § 4; July 12, 1976, 90 Stat. 913; Pub. L. 95-632, §§ 6-8, Nov. 10, 1978, 92 Stat. 3761, 3762; Pub. L. 97-79, § 9(e), Nov. 16, 1981, 95 Stat. 1079; Pub. L. 97-304, §§ 7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427.)

§ 1541. Endangered plants

The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or

may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after December 28, 1973, the results of such review including recommendations for new legislation or the amendment of existing legislation.

(Pub. L. 93-205, § 12, Dec. 28, 1973, 87 Stat. 901.)

§ 1542. Authorization of appropriations

(a) In general

Except as provided in subsections (b), (c), and (d) of this section, there are authorized to be appropriated—

(1) not to exceed $27,000,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this chapter;

(2) not to exceed $3,500,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this chapter; and

(3) not to exceed $1,850,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this chapter and the Convention which pertain to the importation or exportation of plants.

(b) Cooperation with States

For the purposes of section 1535 of this title, there are authorized to be appropriated not to exceed $6,000,000 for each of fiscal years 1983, 1984, and 1985.

(c) Exemptions

There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee

in carrying out their functions under section 1536(e), (g), and (h) of this title not to exceed $600,000 for each of fiscal years 1983, 1984, and 1985.

(d) Convention implementation

There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 1537a(e) of this title not to exceed $150,000 for each of fiscal years 1983 and 1984, and not to exceed $300,000 for fiscal year 1985, and such sums shall remain available until expended.

(Pub. L. 93-205, § 15, Dec. 28, 1973, 87 Stat. 903; Pub. L. 94-325, June 30, 1976, 90 Stat. 724; Pub. L. 95-632, § 9, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96-159, § 8, Dec. 28, 1979, 93 Stat. 1230; Pub. L. 97-304, § 8(a), Oct. 13, 1982, 96 Stat. 1425.)

§ 1543. Construction with Marine Mammal Protection Act of 1972

Except as otherwise provided in this chapter, no provision of this chapter shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972 [16 U.S.C. 1361 et seq.].

(Pub. L. 93-205, § 17, Dec. 28, 1973, 87 Stat. 903.)

APPENDIX J

WASHOE PROJECT, NEVADA-CALIFORNIA

§ 614. Authorization for construction, operation and maintenance

For the purposes of furnishing water for the irrigation of approximately fifty thousand acres of land in the Carson and Truckee River Basins, Nevada and California, providing drainage service to approximately thirty-one thousand acres of land therein, firming the existing water supplies of lands under the Truckee River storage project and the Newlands project, controlling floods, providing hydroelectric power, development of fish and wildlife resources, and for other beneficial purposes, the Secretary of the Interior is authorized to construct, operate, and maintain the Washoe reclamation project consisting of two principal reservoirs at the Stampede and Watasheamu sites, together with other necessary works for the impounding, diversion, and the delivery of water, the generation and transmission of hydroelectric power, and the drainage of lands. The dam at the Stampede site shall be so constructed as to permit its ultimate enlargement to a height at which the reservoir will have a capacity of approximately one hundred and seventy-five thousand acre-feet. Aug. 1, 1956, c. 809, § 1, 70 Stat. 775.

§ 614a. Law governing; repayment of construction costs; contracts for supplemental water supply; net revenues from sale of commercial power; Alpine County water users; waters of Little Truckee River

(a) In constructing, operating, and maintaining the works authorized in section 614 of this title, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 389, and Acts amendatory thereof or supplementary thereto) except as is otherwise provided in sections 614-614d of this title.

(b) Any contract entered into under section 485h(d) of this title for payment of those portions of the costs of constructing, operating, and maintaining the Washoe reclamation project which are properly allocable to irrigation and drainage and which are assigned to be paid by the contracting organization may provide for the repayment of the portion of the construction cost of the project assigned to any project contract unit or, if the contract unit be divided into two or more irrigation or drainage blocks, to any such block over a period of not more than fifty years, exclusive of any permissible development period, or as near thereto as is consistent with the adoption and operation of a variable payment formula which, being based on full repayment within the period stated under normal conditions, permits variance in the required annual payments in the light of economic factors pertinent to the ability of the organization to pay: *Provided*, That any contract for a supplemental water supply for irrigation under sections 614-614d of this title may omit provisions complying with the third sentence of section 423e of this title if such contract, in lieu of such provisions, provides that the pro rata share of the irrigation allocation which is attributable to furnishing irrigation benefits, in each particular year, to land held in private ownership by any one owner in excess of one hundred and sixty irrigated acres, shall be returned with interest determined in accordance with subsection (c) of this section, except that such payment for the excess lands shall not exceed an amount equal to the increased payment capacity of the excess lands, as determined by the Secretary of the Interior, resulting from the supplemental water supply.

(c) Notwithstanding any other provision of law to the contrary, all net revenues derived from the sale of commercial power from the Washoe reclamation project shall be applied, first, to the amortization of that portion of the cost of constructing the project which is allocated to commercial power with interest on the unamortized bal-

ance thereof at the average rate (which rate shall be certified by the Secretary of the Treasury) paid by the United States on its marketable long-term securities outstanding on August 1, 1956, and thereafter to the amortization of that portion of the cost of constructing the project which is allocated to irrigation but which is beyond the ability of the contracting irrigation organizations to repay as provided above, including interest that would have been paid by the irrigators on that portion of the irrigation allocation attributable to furnishing irrigation benefits to excess lands which is not repaid under subsection (b) of this section: *Provided*, That the Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments.

(d) Water users in Alpine County, California, shall have the opportunity to contract for project water made available by the Watasheamu Reservoir before such project water is offered for the development of any new land in Nevada. Should any such project water be contracted for by Alpine County water users, then in that event such users shall be permitted to exchange such water for existing rights to natural flow or stored water of the West Carson River.

(e) The use of waters of the Little Truckee River solely for the generation of electric power by the Washoe project shall not impair or preclude the appropriation of such waters in the future for beneficial consumptive use within the Little Truckee River watershed in California to the same extent as such waters may be presently available for such appropriation in the State of California: *Provided*, That if and when an interstate compact covering the distribution and use of the waters of the Truckee and Carson Rivers is approved by the Legislatures of the

States of California and Nevada and is consented to by Congress, the operation of the Washoe reclamation project shall be in conformance with such compact, and the foregoing restriction shall not apply. Aug. 1, 1956, c. 809, § 2, 70 Stat. 775.

§ 614b. Facilities for access, public health and safety, and protection of public property; withdrawal of lands from entry; nonreimbursable costs

The Secretary is authorized to investigate, plan, construct, operate, and maintain minimum basic facilities for access to, and for the maintenance of public health and safety and the protection of public property on, lands withdrawn or acquired for the development of the Washoe project, to conserve the scenery and natural, historic, and archeologic objects, and to provide for public use and enjoyment of the same and of the water areas created by this project by such means as are consistent with its primary purposes. The Secretary is authorized to withdraw from entry or other disposition under the public land laws such public lands as are necessary for the construction, operation, and maintenance of said minimum basic facilities and for the other purposes specified in this section and to dispose of such lands to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon such terms and conditions as will best promote their development and operation in the public interest. The Secretary is further authorized to investigate the need for acquiring other lands for said purposes and to report thereon to the Committees on Interior and Insular Affairs of the Senate and House of Representatives, but no lands shall be acquired solely for any of these purposes other than access to project lands and the maintenance of public health and safety and the protection of public property thereon without further authorization by the Congress. All costs incurred pursuant to this section shall be nonreimbursable and nonreturnable. Aug. 1 1956, c. 809, § 3, 70 Stat. 776.

§ 614c. Facilities for development of fish and wildlife resources; minimum water releases; cost

Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake fishery. The cost of such facilities, including operation and maintenance, shall be nonreimbursable. The cost to the Federal Government of constructing these facilities shall not exceed $2,000,000. This amount shall not include the cost of measures undertaken, pursuant to section 662 of Title 16, to mitigate damages to fish and wildlife resources occasioned by the Washoe project as authorized by section 614 of this title. Aug. 1, 1956, c. 809, § 4, 70 Stat. 777.

§ 614d. Authorization of appropriations

There is authorized to be appropriated for construction of the Washoe reclamation project the sum of $52,000,000 (April 1958 prices) plus such amounts, if any, as may be required by reason of changes in construction costs as indicated by engineering costs indices applicable to the types of construction involved therein and, in addition thereto, such sums as may be required to operate and maintain the project: *Provided*, That the appropriation of funds for the construction, operation, or maintenance of facilities authorized by section 614c of this title shall not be from the reclamation fund. Aug. 1, 1956, c. 809, § 5, 70 Stat. 777; Aug. 21, 1958, Pub. L. 85-706, 72 Stat. 705.

APPENDIX K

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Hungry Horse Dam, South Fork of the Flathead River, Flathead County, Montana, ch. 234, 58 Stat. 270, (1944) (codified at 43 U.S.C. § 593a).

Lewiston Orchards Project, Idaho, ch. 706, 60 Stat. 717 (1946).

Paonia Project, Colorado, ch. 148, 61 Stat. 181 (1947).

Preston Bench Project, Idaho, ch. 470, 62 Stat. 442 (1948).

Weber Basin Project, Utah, ch. 519, 63 Stat. 677 (1949).

American River Basin Development, California, ch. 690, 630 Stat. 852 (1949).

Palisades Dam and Reservoir Project, Idaho, ch. 1114, 64 Stat. 1083 (1950).

Collbran Project, Colorado, ch. 565, 66 Stat. 325 (1952).

Glendo Unit (Wyoming), Missouri River Basin Project, ch. 532, 68 Stat. 486 (1954).

Foster Creek Division, Chief Joseph Dam Project, Washington, ch. 585, 68 Stat. 568 (1954).

Talent Division, Rogue River Basin Project, Oregon, ch. 775, 68 Stat. 752 (1954).

Ainsworth, Lavaca Flats, Mirage Flats Extension, and O'Neil Units, Missouri River Basin Project, ch. 781, 68 Stat. 757 (1954).

Michaud Flats Project, Idaho, ch. 1159, 68 Stat. 1026 (1954).

Trinity River Division, Central Valley Project, California, ch. 872, 69 Stat. 719 (1955).

Juniper Division, Wapinitia Project, Oregon, ch. 360, 70 Stat. 244 (1956).

Farwell Unit, Missouri River Basin Project, Nebraska, ch. 923, 70 Stat. 975 (1956).

Crooked River Project, Oregon, ch. 980, 70 Stat. 1058 (1956) (codified at 43 U.S.C. § 615f).

Red Willow Dam and Reservoir, Nebraska, Pub. L. No. 85-783, 72 Stat. 937 (1958).

Spokane Valley Project, Washington and Idaho, Pub. L. No. 86-276, 73 Stat. 561 (1959).

Western Division, The Dalles Project, Oregon, Pub. L. No. 86-745, 74 Stat. 882 (1960).

Mann Creek Project, Idaho, Pub. L. No. 87-589, 76 Stat. 388 (1962) (codified at 43 U.S.C. §§ 616g-616j).

Fryingpan-Arkansas Project, Colorado, Pub. L. No. 87-590, 76 Stat. 389 (1962).

Upper Division, Baker Project, Oregon, Pub. L. No. 87-706, 76 Stat. 634 (1962).

Dixie Project, Utah, Pub. L. No. 88-565, 78 Stat. 848 (1964).

Manson Unit, Chief Joseph Dam Project, Washington, Pub. L. No. 89-557, 80 Stat. 704 (1966) (codified at 43 U.S.C. §§ 616vv-1—616vv-5).

Tualatin Project, Oregon, Pub. L. No. 89-596, 80 Stat. 822 (1966) (codified at 43 U.S.C. §§ 616nnn-616sss).

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No. 84-808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA, *et al.*,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior,
PYRAMID LAKE PAIUTE TRIBE OF INDIANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act authorizes the Secretary of Interior to operate a federal reservoir for the conservation of endangered and threatened fish species where use of the reservoir in the manner sought by the petitioners would jeopardize the continued existence of the species and the reservoir has not been committed to any conflicting uses.

2. Whether the court of appeals properly deferred resolution of the extent of the Secretary's obligation under the Washoe Project Act to obtain reimbursement for the construction of Stampede Reservoir prior to the delivery of any water for a reimbursable purpose.

3. Whether the court of appeal's decision can be sustained on the alternative grounds that the sale of water from Stampede Reservoir for municipal and industrial use in the Cities of Reno and Sparks, Nevada, is not authorized by the Washoe Project Act or that the petitioners have neither standing nor a private right of action to compel the Secretary to obtain reimbursement for the cost of constructing Stampede Reservoir.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RELEVANT STATUTES	1
STATEMENT OF THE CASE	1
ARGUMENT	10
1. The Endangered Species Act Issues Do Not Warrant Supreme Court Review	10
2. The Court of Appeals Properly Deferred a Decision on the Secretary's Reimbursement Obligation under the WPA	21
3. Several Alternate Grounds Support the Lower Courts' Result	24
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Andrus v. Glover Construction Co., 446 U.S. 608 (1980) 20
Berkemer v. McCarty, 104 S. Ct. 3138 (1984) 24
California v. Sierra Club, 451 U.S. 287 (1981) 25
Colautti v. Franklin, 439 U.S. 379 (1979) 20
Connor v. Andrus, 453 F. Supp. 1037 (W.D. Tex. 1978) 20
Cort v. Ash, 422 U.S. 66 (1975) 25
Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977) 19
Massachusetts Mut. Life Co. v. Ludwig, 426 U.S. 479 (1976) 24
National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976) 19
Nevada v. United States, 103 S. Ct. 2906 (1983) .. 2, 3, 4, 15
North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) 19
Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) 2
Roosevelt Campobello Intern. Park v. EPA, 684 F.2d 1041 (1st Cir. 1982) 19
Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984) 20
Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) 19
TVA v. Hill, 437 U.S. 153 (1978) 10, 12, 15-18, 20-22
Thigpen v. Roberts, 104 S. Ct. 2916 (1984) 24
United States v. Nevada, 412 U.S. 534 (1973) 2
United States v. Richardson, 418 U.S. 166 (1974) .. 25
Valley Forge College v. Americans United, 454 U.S. 464 (1982) 25
Warth v. Seldin, 422 U.S. 490 (1975) 25

STATUTES AND REGULATIONS

16 U.S.C. §§ 1531 *et seq.* 10-12, 14, 17-21
43 U.S.C. § 390b 1, 25
43 U.S.C. §§ 485-485(h) 23, 25

TABLE OF AUTHORITIES—Continued

	Page
43 U.S.C. §§ 614-614d	4, 12, 23
43 U.S.C. § 615bb	23
43 U.S.C. § 617c(b)	23
43 U.S.C. § 620c	23
45 Stat. 1058	23
70 Stat. 107	23
70 Stat. 777	4
72 Stat. 319	1
74 Stat. 225	23
Pub. L. No. 96-159, 93 Stat. 1225 (1979)	21
Pub. L. No. 97-304, 96 Stat. 1411 (1982)	21
32 F. R. 4001 (1967)	3
40 F. R. 29863 (1975)	3
50 C.F.R. § 17.11(h)	3
Nev. Rev. Stat. § 704.230	7
Nev. Rev. Stat. § 235.075	3
Nev. Admin. Code § 503.065	3
LEGISLATIVE MATERIALS	
H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955)	4, 25
H. R. Rep. No. 2055, 84th Cong. 2d Sess. 4 (1956) *reprinted in* 1956 U.S. Code Cong. & Ad. News 3758	5
S. Rep. No. 1829, 84th Cong. 2d Sess. 6 (1956)	5
1978 U.S. Code Cong. & Ad. News 9460	21
Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Sess. 361 (1978)	21
TREATISES AND ADMINISTRATIVE OPINIONS	
In Re Filing by Sierra Pacific Power Company, Docket Nos. 81-204, 84-665, slip op. at 15-17 (Pub. Serv. Comm. of Nev. Nov. 19, 1984)	8
9 Moore's Federal Practice ¶ 204.11[3] (2d ed.)	24

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

RELEVANT STATUTES

In addition to the statutes relied on by petitioners (Petition "Pet." 2) Respondent Pyramid Lake Paiute Tribe relies on the Water Supply Act of 1958, 72 Stat. 319, as amended, 43 U.S.C. § 390b (Tribe App. 1a).[1]

STATEMENT OF THE CASE

Since 1970, each Secretary of the Interior ("Secretary"), including Secretaries Hickel, Morton, Hathaway, Kleppe, Andrus, Watt and Clark, has operated Stampede Reservoir, part of a federal reclamation project, for the authorized purposes of flood control, recreation, enhance-

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[1] "Pet. App." refers to the separately bound Appendix which the petitioners have filed pursuant to Supreme Court Rule 21.1(k). "Tribe App." refers to the Appendix to this Brief.

ment of fish and wildlife, and has made water releases for the benefit of Pyramid Lake's two principal fish, the cui-ui and the Lahontan cutthroat trout, which have been classified as endangered and threatened species respectively under the Endangered Species Act ("ESA"). In this case, the Carson-Truckee Water Conservatory District ("District"), the Sierra Pacific Power Company ("Sierra Pacific") and the State of Nevada (collectively "petitioners"), sued to compel the Secretary to sell the District water from Stampede Reservoir for resale for municipal and industrial ("M & I") purposes in Reno and Sparks, Nevada and to enjoin further water releases for the benefit of the endangered and threatened fish.

Stampede Reservoir is part of the Truckee River system which is described by the district court in its two decisions. Pet. App. 23a, 38a-39a.[2] Historically, Pyramid Lake[3] received the entire natural flow of the Truckee and Little Truckee Rivers. These rivers maintained the lake level and provided river spawning flows for the cui-ui and the Lahontan cutthroat trout. The lake level and spawning flows remain dependent upon the inflow from these two rivers. The inflow to the lake is much smaller now, however, because of upstream diversions and use of water for irrigation and M & I in Reno and Sparks. As a result, the level of Pyramid Lake dropped some 40 feet between 1920 and 1938. By 1921 a delta had formed at the mouth of the Truckee which prevented

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[2] *See United States v. Nevada*, 412 U.S. 534, 535-536 (1973); *Nevada v. United States*, 103 S. Ct. 2906, 2910 (1983). A map depicting the area in question is reproduced in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 259 (D.D.C. 1973).

[3] Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation which was set aside in 1859. One of the purposes of the reservation "was to enable the Tribe to take advantage of the Pyramid Lake fishery, which among other things includes a native species of cutthroat trout, and the cui-ui fish, which exists nowhere else." Pet. App. 39a.

the cui-ui and Lahontan cutthroat trout from reaching their Truckee River spawning grounds, resulting in the near extinction of both species. Pet. App. 39a-40a; *Nevada v. United States*, 103 S. Ct. 2906, 2913 n. 7 (1983). By spawning along the edges of the lake where the fresh water entered, the cui-ui barely survived. The Lahontan cutthroat trout died out entirely and had to be reintroduced into the lake through artificial means. Pet. App. 40a.

The cui-ui (*Chasmistes cujus*) is a member of the sucker family (*Catostomidae*), the only pure species remaining in the genus *Chasmistes*, and is found only in Pyramid Lake. Pet. App. 39a, 48a. Its average size is four to six pounds, and reaches a maximum of 9 pounds. The cui-ui formerly constituted a staple of the diet of the members of the Pyramid Lake Tribe. In 1967, the Secretary declared the cui-ui an endangered species. 32 F.R. 4001 (1967). Pet. App. 14a, 27a, 40a-41a. *See* 50 C.F.R. § 17.11(h) (1983). The cui-ui is also classified as "endangered" pursuant to Nevada law, Nev. Admin. Code § 503.065, and is protected by tribal resolution which prohibits fishing for cui-ui.

The Lahontan cutthroat trout (*Salmo clarki henshawi*) belongs to the salmon and trout family (*Salmonidae*) and is one of the largest and finest sport fish in the world. The Pyramid Lake Tribe historically fished the trout for sustenance and commerce. Like the cui-ui, the trout spend most of their life in Pyramid Lake where they attain a size of 10 to 20 pounds. A 40 pound Pyramid Lake Lahontan cutthroat trout is the world record for the species. The Lahontan cutthroat trout was originally listed as an endangered species and, in 1975, was upgraded to the status of a threatened species. 40 F.R. 29863 (1975). Pet. App. 14a, 27a, 41a. *See* 50 C.F.R. § 17.11(h) (1983). It is the official state fish of Nevada. Nev. Rev. Stat. § 235.075.

Because of the highly seasonal nature of river flows in Western Nevada, a number of storage reservoirs have been built to provide flood control in the winter and a water supply during the summer. Virtually all of the reservoirs have been constructed by the Bureau of Reclamation ("Reclamation") in connection with the Newlands Project,[4] the Truckee Storage Project and the Washoe Project.

In 1956 Congress enacted the Washoe Project Act ("WPA").[5] The stated purposes were: (1) to irrigate approximately 50,000 acres in the Carson and Truckee River basins; (2) to provide drainage service to another 31,000 acres; (3) to firm up existing water supplies for the Newlands and Truckee Storage Projects; (4) to control floods; (5) to provide hydroelectric power; (6) to develop fish and wildlife resources; and (7) for "other beneficial purposes." As part of the project, the Secretary was authorized to construct Stampede Reservoir. Pet. App. 12a, 40a. Congress specifically considered whether the proposed project should provide M & I water to Reno and Sparks but concluded that existing water supplies were adequate to meet their needs if the cities implemented reasonable water conservation measures. H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955).

The WPA specifically recognized that the preservation of Pyramid Lake and restoration of its fishery were of national concern and authorized the Secretary to utilize project facilities for this purpose. Section 4 of the Act provides in part:

> Facilities shall be provided for the development of the fish and wildlife resources of the project area

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[4] The Newlands Project and its impact on the Truckee River and Pyramid Lake is described in *Nevada v. United States*, 103 S. Ct. at 2910-2913. *See also* Pet. App. 39a.

[5] Washoe Project Act of August 1, 1956, 70 Stat. 777, 43 U.S.C. §§ 614-614d. Pet. App. 12a, 24a, 145a-149a.

> including facilities to permit increased minimum water releases from Lake Tahoe and restoration of Pyramid Lake fishery.[6]

During 1964, storms and heavy rains caused flooding in the Reno-Sparks area. Reclamation studies revealed that Boca Dam, located on the Little Truckee River 20 miles upstream from Reno, might collapse during a maximum predictable flood for the area. Reclamation concluded that the most logical method of protecting Boca Dam would be to construct Stampede as expeditiously as possible. At the same time, the Bureau of Indian Affairs expressed strong opposition to the construction of Stampede Reservoir on the grounds that it would be inimical to the best interests of the Pyramid Lake Tribe and its fishery. Pet. App. 13a-14a, 26a.

The District and Sierra Pacific then urged that construction on Stampede begin even if only for flood protection purposes. Shortly thereafter, the Commissioner of Reclamation recommended that the Secretary authorize the immediate start of construction without executing a repayment contract with the District because the annual benefits of flood control, recreation and fish and wildlife enhancement justified going forward with construction of the dam solely on that basis. Pet. App. 14a, 26a. Therefore, without executing a contract with the District, the Secretary commenced construction of Stampede

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[6] The House Committee Report on the bill stated:

> The fishery of Pyramid Lake was once world famous and widely used by sportsmen in addition to forming a major contribution to the livelihood of Indians of the Pyramid Lake Indian Reservation . . . . Restoration of the Pyramid Lake trout fishery *to its full potential value* is deemed to be of national interest and importance. . . .

H. R. Rep. No. 2055, 84th Cong. 2d Sess. 4-5 (1956), *reprinted in* 1956 U.S. Code Cong. & Ad. News 3758 (*emphasis added*). The Senate report reiterated the national importance of the Pyramid Lake fishery. S. Rep. No. 1829, 84th Cong. 2d Sess. 6 (1956).

because there was an immediate need for flood control protection for Boca Dam and the Reno-Sparks area.

Construction on Stampede was completed in 1970. Pet App. 40a. Although the United States filed applications to appropriate the waters of the Little Truckee River stored in Stampede Reservoir with the Nevada State Engineer as early as 1954, those applications have never been acted upon owing to the unsettled state of Truckee River water rights. *See* Pet. App. 35a. As part of the Washoe project, Marble Bluff Dam and Fishway was completed in 1976. This $7.7 million facility at the mouth of the Truckee River enables cui-ui and trout to bypass the river delta and ascend to their spawning grounds and is also used to get cui-ui and trout out of the lake to take their eggs for incubation at the Tribe's hatcheries. Pet. App. 25a, 41a.

Since Derby Dam became operational in 1905, only those waters not diverted or stored by upstream users have reached the lower Truckee River and Pyramid Lake. Those flows reach their peak from mid-March through June when most of the winter snow melts. These spring flows are the primary reason for the cui-ui's survival. Stampede Reservoir could significantly reduce these spring flows because it is designed to capture and store that spring runoff. If Stampede captured the high spring runoff and held that water to meet M & I demand at other times of the year, the flow during the spawning season would be reduced below the level which caused the cui-ui and trout to become endangered and threatened. The district court found that this would "jeopardize the existence of the cui-ui and hasten their extinction." Pet. App. 50a.

Since Stampede's construction, however, the Secretary has never committed water stored in the reservoir to uses which would conflict with the fishery but has used the water in connection with the Pyramid Lake fishery

restoration program administered by the United States Fish and Wildlife Service. Pet. App. 48a-49a. In this way, the Secretary has carried out several of Stampede's primary purposes, such as flood control, recreation and restoration of the Pyramid Lake fishery, without jeopardizing the continued existence of the cui-ui or entirely halting reservoir operation. The Fish and Wildlife Service cui-ui restoration program consists mainly of developing a self-sustaining population through natural reproduction. Water is released from Stampede for three purposes: (1) to attract the spawning population to the mouth of the Pyramid Lake Fishway where they are captured for the Tribe's cui-ui hatchery or allowed to pass on to the lower Truckee River for natural spawning; (2) to provide the proper water temperature and volume for natural spawning in the river; and (3) to attract the trout to the fishway where they are captured and their eggs are taken for use in the three trout hatcheries. Pet. App. 48a-49a. Through data analysis and operational experience, the Fish and Wildlife Service has developed a lower Truckee flow regime which makes optimum beneficial use of the water available for the fishery.

Since Stampede's completion in 1970, no water from the reservoir has been diverted to Reno or Sparks for M & I use. Although this period included one of this century's most severe droughts, Reno and Sparks met 100% of their M & I needs from other sources. As the government's expert testified, "There are adequate sources to meet the M & I needs in the Truckee Meadows Basin in the year 2030 without the need for Stampede water if present constraints in the area against reasonable water conservation practices are overcome." The primary constraints are a state law prohibiting residential water meters in Reno and Sparks[7] and Sierra Pa-

[7] Nev. Rev. Stat. § 704.230. The prohibition applies only to Reno and Sparks. Other Nevada cities such as Las Vegas and Carson City have residential water meters.

cific's flat rate charge for residential water service. These constraints have caused per capita water use in Reno and Sparks to be much higher than in similarly situated areas. For example, the Reno and Sparks 1963-72 average per capita water use was 335 gallons per day ("gpd") compared with 230 gpd in Las Vegas, 154 gpd in Carson City and 197 gpd in Denver. This "lavish" consumption of water caused Congress to refuse to authorize M & I water for Reno and Sparks under the WPA.

Unwilling to implement reasonable water conservation measures or to purchase unused water rights and convert them to M & I use,[8] in 1976, the District, Sierra Pacific and Nevada brought this action to enjoin the release of water from Stampede for fishery purposes and to compel the Secretary to sell water to them for M & I use in Reno and Sparks. After trial on the merits, the district court bifurcated the post-trial briefing and argument. In its first decision (*"Carson-Truckee I"*, Pet. App. 23a-36a), the district court held that the Secretary could not be required to sell Stampede water needed to fulfill his obligations under ESA or his trust obligations to the Tribe. The court concluded, however, that to the extent that water is available for sale, the Secretary is

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[8] The Public Service Commission of Nevada recently admonished Sierra Pacific for its failure to aggressively attempt to purchase available water rights and ordered the company to institute a system whereby applicants for water service must receive water service commitments within 60 days of application. The Commission noted that some 28,000 acre-feet of water rights had been identified as being available for purchase, almost five times the amount currently needed to satisfy Sierra Pacific's entire waiting list. The Commission also noted that 63% of the projects on the waiting list have not yet secured government approval. These findings refute petitioners' claim that "[b]ecause the Secretary is presently prohibited from selling M & I water to the District, Sierra Pacific has been unable to meet its service commitments." Pet. 13. *See In Re Filing by Sierra Pacific Power Company*, Docket Nos. 81-204, 84-665, slip op. at 15-17 (Pub. Serv. Comm. of Nev. Nov. 19, 1984).

obligated to obtain reimbursement for the costs of Stampede and is authorized to sell Stampede water for M & I uses. The court also held that petitioners have standing to maintain this action and have a private right of action to enforce the Secretary's reimbursement obligation. Pet. App. 36a.

In its second decision (*"Carson-Truckee II"*, Pet. App. 37a-54a) the district court upheld the Secretary's decision not to sell Stampede water to petitioners on three grounds: First, ESA authorizes the Secretary to give priority to conserving the fish as long as they are endangered and threatened. Second, the Secretary's finding that there is no excess water to sell after fulfilling those statutory obligations was supported by substantial evidence. Third, petitioner's proposed alternate plan for the operation of the reservoir would jeopardize the existence of the fish.

The court of appeals affirmed the district court on all but one issue. Concerning *Carson-Truckee I*, the court vacated the district court's holding that the Secretary had an obligation under the WPA to obtain reimbursement for project costs by selling Stampede water for M & I uses. Noting that the WPA, in contrast to other reclamation project acts, did not prohibit construction pending execution of repayment contracts and that all of the project's water is currently needed to conserve the two species of fish, the court held that the WPA anticipates, but does not require, the Secretary to obtain reimbursement by selling water for M & I use. The court therefore did not need to resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future. Pet. App. 4a-5a, 8a.

Concerning *Carson-Truckee II*, the court of appeals rejected petitioners' argument, also made before this court, that the Secretary's only obligation is to avoid "jeopardiz[ing] the continued existence" of the fish under ESA

§ 7(a)(2). Relying on ESA §§ 2(b), (c), 3(3) and 7(a)(1), and this court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), the court held that "the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection." Pet. App. 8a. The court explicitly refused to decide, however, whether the ESA required the Secretary to use all Stampede water for conservation purposes. *Id.*, n.5. Finally, the court of appeals affirmed the district court's holding that the Secretary did not abuse his discretion in rejecting petitioners' alternative plan because, *inter alia*, it is not feasible to operate Stampede for both M & I and fishery purposes. Pet. App. 8a-10a.

ARGUMENT

1. The Endangered Species Act Issues Do Not Warrant Supreme Court Review.

a. The petitioners misrepresent the decision of the court of appeals and its potential for impact on other federal projects and misstate this court's prior decisions in a futile attempt to create some basis for granting review. The decision of the court of appeals in the unique circumstances of this case, however, is correct and does not conflict with any decision of this Court or any other court of appeals.

In fact, petitioners cannot possibly prevail on the merits. They concede, as they must, that at a minimum the Secretary must insure that his operation of Stampede will not be likely to jeopardize the continued existence of the listed species (Pet. 10) and that in the event of an "irreconcilable conflict" between water for M & I use and water for the fish, the fish must be given priority (Pet. 12). The district court found that "it is not feasible to operate Stampede for both M & I and fishery purposes" and that petitioners' plan for the operation of Stampede "would jeopardize the existence of the cui-ui." Pet. App.

50a. The district court had previously found that "there is an 'irreconcilable conflict' between the Plaintiffs' request to compel the Secretary to execute a cost reimbursement contract and the well being of the Lahontan cutthroat trout." Pet. App. 20a. These findings of fact were affirmed by the court of appeals (Pet. App. 9a-10a) and have not been challenged in the Petition for Certiorari.

Having had a full and fair opportunity to demonstrate to the lower courts how Stampede could be operated for both M & I and fishery purposes and having failed, petitioners now claim that the point of their plan was "merely to illustrate one way in which the competing water needs could be reconciled." Pet. 10, n.3. They claim that the Secretary has a duty to establish an alternative plan through the § 7(a)(3) consultation process. *Id.* This argument falls short of creating a basis for review for several reasons. First, petitioners have not challenged the lower courts' *factual finding* that it is not feasible to operate Stampede for both M & I and fishery purposes; therefore, as a matter of undisputed fact, *no* alternative plan is possible and consultation is unnecessary. As explained by the district court (Pet. App. 50a), the precarious condition of both the cui-ui and the trout is attributable to inadequate flows of the Truckee River into Pyramid Lake. Consequently, further reductions in those flows can only make an already bad situation even worse. Second, the § 7(a)(3) consultation duty arises only if there is proposed agency action under § 7(a)(2). Petitioners also have not disputed the court of appeals' holding that § 7(a)(2) does not apply here because there is no proposed agency action. Pet. App. 8a. Third, before the district court the petitioners specifically rejected any notion that the Secretary should conduct a § 7(a)(3) consultation, preferring instead to rely on their own plan for the operation of Stampede. Having failed to convince the lower courts that their plan met the requirements of ESA, they cannot now advance an argument that has not only not previously been urged but has been

specifically rejected. Therefore, even assuming that petitioners are correct and the § 7(a)(2) standard is the only standard that applies to the Secretary's actions, petitioners cannot prevail because the lower courts expressly found that any M & I use of Stampede would jeopardize the continued existence of the fish. This result is completely in accordance with this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978) and disposes of any argument that this case is worthy of review. Petitioners' real quarrel is with the district court's unchallenged factual findings, a manifestly unfit subject for review by this Court.

b. The result reached by the court of appeals in this case does not establish a broad precedent which will affect federal projects and programs generally. The instant case is unique in several respects. First, the requirements of the WPA and ESA are consistent since § 4 of WPA, 43 U.S.C. § 614c, expressly provides that one of the project purposes is restoration of the Pyramid Lake fishery. Second, using the water from Stampede for the fishery does not interfere with any vested water rights since the water has been used for the fishery since the project was constructed and has not been committed contractually or otherwise to anyone else. Third, conservation of the endangered and threatened fish of Pyramid Lake is the only use of Stampede which has been proposed which would not jeopardize the continued existence of those species. Thus, by using Stampede for that purpose, the reservoir can be used where otherwise it would remain empty, and in connection with such use can include the critical purpose of flood control. Fourth, since 1970, each Secretary of the Interior has affirmatively determined that Stampede should be used in this manner. For these reasons it is clear that the ruling below will have virtually no precedential impact.

In an attempt to create some basis for review by this Court of the court of appeal's decision, petitioners devote almost seven pages of their petition to a description of

federal programs and projects which they allege will be affected adversely by the decision below. Pet. 14-20. The single most important factor distinguishing those projects from the Washoe Project, however, is that the Secretary is not attempting to use any of them to conserve endangered and threatened species. The reason, of course, is that very rarely do circumstances arise in which an operator of a federal project or program is faced with the choice of either not proceeding with a project which would jeopardize the existence of endangered species or using the project to conserve that species. The fact that this issue has arisen only in connection with Stampede Reservoir and not with regard to any of the projects listed by petitioners (Pet. 15-16) is evidence of the limited circumstances in which an agency will be able to use a federal project to conserve endangered species.

For the same reason petitioners are wrong in suggesting that the court of appeal's decision will "convert the primary mission of the Air Force from national defense to the restoration of" endangered species (Pet. 16 n.8), cause federal highway funds to be impounded (Pet. 17) or force the Secretary of Agriculture to manage national forests solely to restore endangered species (Pet. 18). The court of appeal's limited holding did nothing more than approve the Secretary's discretionary decision to undertake a conservation program where the only available alternative was to abandon a federal project. Thus, the issue presented by the instant case cannot be expected to arise with any frequency in the future so as to render the decision below one of broad importance warranting review.

c. Moreover, petitioners base their main argument in support of review on a misrepresentation of the court of appeal's basic holding. They claim that the court of appeals *required* the Secretary to use *all* Stampede water *exclusively* for the "purpose of restoring the endangered and threatened species to their historical population levels" regardless of the "primary purpose" of the WPA.

Pet. 8. The "pernicious ramifications" of this holding, say the petitioners, will have serious consequences requiring Supreme Court review.

In fact, the court of appeals explicitly refused to decide this issue. In footnote 5 of its opinion, the court of appeals stated:

> Because we hold that the Washoe Project Act does not require the Secretary to sell water for M & I use, *we need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes* under ESA § 2 (b), (c), § 3(3), and § 7(a)(1).

Pet. App. 8a n.5. (Emphasis added) The court of appeals did not hold that the Secretary was required to use all Stampede water exclusively for conservation purposes irrespective of the WPA. It merely held that, under the unique facts and applicable laws of this case, the ESA authorized the Secretary to give priority to conservation of the fish in his use of Stampede water and that the Secretary did not abuse his discretion in this use where the only alternative would be to make no use whatsoever of the reservoir. *Id.* at 6a-8a. Moreover, because the Secretary actively seeks to use the project for conservation purposes, the court of appeals declined to consider the Secretary's "affirmative obligations under ESA § 2 (b), (c), § 3(3), and § 7(a)(1)." Pet. App. 8a n.5. Thus, contrary to the contentions of petitioners, the Secretary was not "required" or "commanded" (Pet. 8) to do anything. This narrow holding scarcely has the "pernicious ramifications" petitioners describe.

Contrary to petitioners' further misrepresentations, neither the court of appeals nor the district court said anything about "restoring the . . . species to their historical population levels." Pet. 8-9. The courts found that "ESA also directs the Secretary to conserve threatened and endangered species to the extent that they are

no longer threatened or endangered." Pet. App. 6a, 46a. Given the tremendous size of the historical cui-ui and Lahontan cutthroat trout populations of Pyramid Lake, this difference is significant.

The lower courts also did not "require the Secretary to use all of the water . . . from all other reclamation projects in the area." Pet. 8. There is an obvious and vast difference between Stampede, which has been used from its inception for the benefit of the Pyramid Lake fishery, and other projects whose waters and water rights have been committed, sold to, adjudicated and vested in private users. In *Nevada v. United States*, 103 S. Ct. 2906 (1983), this Court held that holders of decreed water rights to the Truckee River in Nevada and subsequent appropriators with vested water rights were protected against the reserved water rights claims made on behalf of the Pyramid Lake fishery. Thus, petitioners' statements about this case requiring the Secretary to use water "from all other reclamation projects in the area" (Pet. 8) are groundless. This case involves only a dispute over unadjudicated and unappropriated waters of the Truckee River between the petitioners, who seek to take more water away from Pyramid Lake and appropriate it for new M & I use, and the Pyramid Lake Tribe and the United States government who are using those waters to preserve, maintain, conserve and restore Pyramid Lake's endangered and threatened fish.

d. To the extent that the court of appeals approved the use of Stampede's water for conservation, this Court's decision in *TVA v. Hill* amply supports this holding. In particular, the *TVA* Court rejected petitioners' primary contention: that the Secretary must balance ESA's protections against the "primary mission" of a pre-existing federal act.

In *TVA*, this Court addressed the issue of priority between the ESA and other federal acts, and resolved the issue in favor of the ESA. Faced with the choice between

abandoning the Tellico Dam and exterminating the snail darter, this Court placed heavy reliance on the ESA's legislative history in determining that Congress intended the 1973 version of ESA to take precedence over the "primary missions" of federal projects. 437 U.S. at 185. This Court thus issued a decision which could have caused a total abandonment of the Tellico Dam in order to save the snail darter.[9]

The plaintiff in *TVA* argued, as do petitioners, that Congress did not intend such abandonment of primary missions. This Court pointed out, however, that Congress specifically deleted language from the prior ESA which required agencies to conserve species only "*insofar as practicable and consistent with their primary purposes.*" 437 U.S. at 181 (emphasis in original). The *TVA* Court held that Congress' "pointed omission" of this language "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185. Thus, *TVA* precludes any need for further review of petitioners' contention that the ESA gives a federal agency "neither the duty nor the discretion to ignore the primary directive given it by Congress." Pet. 19.

Apparently recognizing the weakness of their position, petitioners then attempt in vain to manufacture a reviewable issue by distinguishing *TVA* factually on the ground

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[9] This case presents much less extreme facts than *TVA v. Hill* where the project could not provide *any* of its promised benefits if the gates were not closed. Stampede is operating and providing substantial flood control, recreation and fish and wildlife benefits. Indeed, at the time construction was authorized, Reclamation estimated that those benefits alone justified Stampede's cost. In addition, Reclamation is in the process of constructing a power plant at Stampede to provide additional monetary as well as energy benefits. Finally, whereas ESA required the *abandonment* of Tellico Dam in favor of the snail darter, in this case it requires the *use* of Stampede for the benefit of the fish. Congress declared that the value of conserving such species is "incalculable." *TVA v. Hill*, 437 U.S. at 178, 187-188.

that the Tellico project presented an "irreconcilable conflict" with the ESA, whereas they allege there is no conflict here because their proposed alternative plan would permit both sale of sufficient water for M & I use and retention of enough water to avoid "jeopardiz[ing] the continued existence" of the fish. Pet. 12. This distinction fails for two reasons. First, the lower courts found that it is not feasible to operate Stampede for both M & I and fishery purposes. Consequently, there is an irreconcilable conflict in this case, just as there was in *TVA*. Second, there is no indication in *TVA* that the decision was limited to cases of irreconcilable conflict. This Court's broad and inclusive language negates any potentially narrow construction: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." 437 U.S. at 184.

Petitioners further claim that this Court should grant review because the court of appeals erred in holding that "the Secretary has an affirmative duty under the Endangered Species Act to restore the Pyramid Lake fish to the point where they no longer merit protection" and ridicule the lower courts' reliance on §§ 2(b) and(c), 3(3) and 7(a)(1) of ESA as "a strange and tortured" interpretation. Pet. 8-9. Again, petitioners' argument is directly contrary to *TVA* which repeatedly states that federal agencies have an affirmative conservation duty under these same four ESA sections. This Court noted that "Congress expressly stated in § 2(c) that 'all Federal departments and agencies *shall* seek to *conserve endangered species* and threatened species. . . .'" 437 U.S. at 180 (emphasis in original). This Court further cited the legislative history of the 1973 amendments, stating that "the purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that these purposes are carried out. . . ." *Id.* at 184 (em-

phasis in original). "Agencies in particular are directed by §§ 2(c) and 3(2) of the Act to 'use . . . *all methods* and procedures which are necessary' to preserve endangered species." *Id.* at 185 (emphasis in original). Thus, this Court's reading of those sections of ESA in *TVA* mirrors that of the lower courts in this case. Pet. App. 6a-8a, 43a-46a.

Perhaps mindful that they are "swimming upstream" against a strong current, petitioners purport to find a basis for review in dictum in *TVA* to the effect that "Congress foresaw that § 7 would, *on occasion*, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Id.* at 186 (emphasis supplied). Petitioners claim that "'occasion" means only cases of "irreconcilable conflict" and that, absent such conflict, a federal agency need only avoid "jeopardiz[ing] the continued existence" of the species. Pet. 18. To illustrate an "occasion" to which it referred, however, the *TVA* Court quoted a House Committee Report which stated that, under the authority of § 7, the U.S. Park Service would be required "to conform the practices of [the] agency" to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park and that appropriate measures could include "supplying them with carcasses from excess elk within the park." 437 U.S. at 187. This activity is far beyond merely not "jeopardiz[ing] the continued existence" of the grizzly bears; it is an affirmative conservation act required of all agencies directed by the ESA to "use . . . all methods and procedures which are necessary" to preserve endangered species. *Id.* at 185. The "occasion" to which this Court referred is not a case of irreconcilable conflict, but rather the presence of endangered or threatened species within the agency's jurisdiction.

Petitioners also complain that the court of appeals "totally fails to take into account" the language of § 7(a)(2) concerning "jeopardiz[ing] the continued existence" of species. Pet. 9-10. The court of appeals,

however, specifically considered and rejected petitioners' § 7(a)(2) argument, relying on *TVA* to hold that "the purpose of ESA § 7(a)(2) is to ensure that the federal government does not undertake actions, such as building a dam or highway, that incidentally jeopardize the existence of endangered or threatened species." Pet. App. 7a-8a. The court of appeals found § 7(a)(2) inapplicable here because "the Secretary has not undertaken a project that threatens an endangered species." Pet. App. 8a.

Petitioners also incorrectly claim there is a conflict between the court of appeals' decision below and decisions of other circuits. Pet. 19. In this case the court of appeals found that ESA § 7(a)(1) and related sections authorize the Secretary to utilize Stampede Reservoir to conserve the endangered and threatened species where the reservoir is capable of such use, the alternative would be to abandon the project, and no vested property rights would be impaired. ESA § 7(a)(2) was found to be inapplicable as no government action is proposed which would jeopardize either species. In the cases cited by petitioners, only § 7(a)(2) applied because the activities involved were not of the type which could be utilized to benefit endangered or threatened species. *See, e.g., Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982) (EPA issuance of NPDES permit for oil refinery); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (sale of oil and gas leases); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976) (construction of dam and reservoir would flood caves containing endangered bats); *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976) (construction of interstate highway). The decision below is consistent with these cases and with cases in which the courts have found that an activity or project could be used to conserve endangered and threatened species and that there is a duty to do so. *See, e.g., Defenders of Wildlife v. Andrus*, 428 F. Supp.

167, 169-170 (D.D.C. 1977); *Connor v. Andrus*, 453 F. Supp. 1037, 1041 (W.D. Tex. 1978); *Sierra Club v. Clark*, 577 F. Supp. 783, 789 (D. Minn. 1984).

Finally, petitioners argue that, even if the Secretary has an affirmative duty to use his "authorities" to conserve the fish, the term "authorities" should be limited to the Secretary's authorized fisheries expenditures under the WPA.[10] Petitioners cite no authority for this proposition, which this Court soundly rejected in *TVA*. Relying on §§ 2(c) and 3(2), the *TVA* court held that "agencies . . . are directed by . . . the Act to 'use . . . *all methods* and procedures necessary' to preserve endangered species." 437 U.S. at 185 (emphasis in original). There is no indication anywhere in *TVA* that this Court intended a narrow reading of an agency's ESA duties. In fact, the TVA Court pointed out that Congress intended federal agencies "*to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources." (Emphasis in original). *Id.* at 177.

Thus, *TVA v. Hill* addressed and decided every ESA issue petitioners have raised. Since *TVA v. Hill* was decided in 1978, Congress has amended ESA six times. Neither § 7 nor this Court's interpretation of that section has been significantly altered. Indeed, in considering amendments to ESA immediately after the decision in *TVA v. Hill* was announced, Congress specifically considered the *TVA v. Hill* decision but declined to amend the operative language of § 7 to lessen the obligation of

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[10] This construction would render § 2(c) and § 7(a)(1) superfluous. There would not be any need for those provisions if Congress merely intended to authorize federal officials to exercise the powers that they already had been granted. To make the statute meaningful, the directive that federal agencies "shall utilize their authorities" must be construed to encompass activities that otherwise could not have been undertaken. *See, Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n. 19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *TVA v. Hill*, 437 U.S. at 173 n. 18.

federal agencies to conserve endangered and threatened species. *See* 1978 U.S. Code Cong. & Ad. News 9460; *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works*, 95th Cong., 2d Sess. 361-362 (1978). Instead, Congress established a procedure whereby federal agencies now can receive exemptions from the requirements of ESA through a seven member cabinet level committee. *See* ESA § 7(e)-(p), 16 U.S.C. § 1536(e)-(p). This exemption process has never been invoked by petitioners with regard to their request for M & I water from Stampede. In 1979, § 7 was amended to separate the section into subsections 7(a)(1), (2), and (3). The language of § 7(a)(1) which existed prior to *TVA v. Hill* was retained. *See* Pub. L. No. 96-159, 93 Stat. 1225, 1226 (1979). Section 7(a) was again amended in 1982 to redesignate then subparagraph (3) as subparagraph (4) and to insert what is now § 7(a)(3). Again, § 7(a)(1) remained unaltered. *See* Pub. L. No. 97-304, 96 Stat. 1411, 1417 (1982). Since 1978, Congress has had ample opportunity to amend the ESA in the manner desired by petitioners but has consistently declined to do so.

2. The Court of Appeals Properly Deferred a Decision on the Secretary's Reimbursement Obligation under the WPA.

The court of appeals vacated the district court's decision on one narrow point. The district court held that, to the extent there is water from Stampede that is not needed to fulfill the Secretary's trust obligations to the Tribe or to protect the endangered and threatened species, the Secretary is required to sell that water for M & I use to obtain reimbursement for the cost of constructing the reservoir. Pet. App. 35a-36a, 38a. The court of appeals found it unnecessary to reach this issue, holding that "we need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future" and that "the Secretary's asserted obligation to sell proj-

ect water for M & I purposes should be considered when his superseding obligations . . . under ESA have been fulfilled." Pet. App. 5a.

The court of appeals deferred decision on this issue because: (1) the WPA contemplates non-M & I uses of water which may require Secretarial consideration if water becomes available for sale, Pet. App. 4a, and (2) Congress pointedly omitted from the WPA any requirement to enter into reimbursement contracts *before* construction and, therefore, the WPA anticipates but does not require the Secretary to sell water to recover construction costs. Pet. App. 5a. The court's deferral of the reimbursement question removes reimbursement as an issue for this Court's review.

In a futile attempt to create an issue for review, however, petitioners incorrectly claim that the court of appeals actually decided the issue and held that the Secretary is under no obligation to obtain reimbursement for the cost of constructing Stampede. Pet. 21. Even assuming the court of appeals actually decided the issue, however, the question is not worthy of review by this court for several reasons.

First, even if the WPA required the Secretary to obtain reimbursement for Stampede construction costs by selling water, the ESA clearly supersedes that obligation under *TVA v. Hill*, *see* § 1 above, and there is no factual or legal issue concerning the Secretary's reimbursement obligation until water is actually available. Second, there is no statutory obligation requiring reimbursement for Stampede construction costs. Contrary to petitioners' contentions, Pet. 21, no general reclamation law requires repayment contract coverage prior to the start of construction of a multi-purpose project such as the Washoe Project and no case or other authority imposes that obligation on the Secretary. Reclamation has adopted a general policy requiring repayment contracts before construction unless there are good and sufficient reasons to

waive the requirement.[11] Congress has never, however, expanded this policy into a general requirement covering the many categories of Reclamation projects. In fact, the court of appeals pointed out that when Congress has directed that reimbursement for project costs is mandatory, it has spelled out that requirement in unmistakable terms in the particular authorizing legislation.[12] With regard to the WPA, Congress only required that the Secretary must enter into repayment contracts before delivering water for reimbursable purposes. Pet. App. 5a, 147a; 43 U.S.C. § 614a(c).

Petitioner's reliance on 43 U.S.C. § 485h(a), Pet. 22, is also misplaced. Section 485h(a) does not obligate the Secretary to obtain reimbursement. It simply provides that the Secretary cannot make any expenditures for the construction of a new project until a report has been submitted to Congress on, among other things, the amount of the project cost which will "probably be repaid" by the project's users. If this amount plus certain other costs equals the total construction cost, the Secretary may proceed without further congressional authorization; if not, further authorization is necessary. In the case of the Washoe Project, the Secretary did not rely upon the general authority contained in 43 U.S.C. § 485h(a), but rather submitted a feasibility report to Congress and obtained specific congressional authorization. Thus, 43

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[11] The requirement was waived with regard to the construction of Stampede after Reclamation determined that the annual benefits of flood control, recreation and fish and wildlife justified construction solely for those uses and that there was an immediate need for flood control protection. Pet. App. 13a.

[12] Pet. App. 5a (San Angelo Project); Act of June 27, 1960, P.L. 86-529, § 2, 74 Stat. 225, 43 U.S.C. § 615bb (Norman Project); Act of April 11, 1956, ch. 203, § 4, 70 Stat. 107, 43 U.S.C. § 620c (Colorado River Storage Project); Act of December 21, 1928, ch. 42, § 4, 45 Stat. 1058, 43 U.S.C. § 617c(b) (Boulder Canyon Project).

U.S.C. § 485h(a) does not require reimbursement in the circumstances of this case.

3. Several Alternate Grounds Support the Lower Courts' Result.

In addition to the ESA, several grounds rejected below support the result reached by the lower courts.[13] Erroneous decisions on these issues led both courts to reach the ESA question and the district court to reach the reimbursement obligation question.

First, the Secretary has no authority to sell Stampede water for M & I use in Reno and Sparks. The WPA's legislative history makes it clear that Congress decided that M & I use of Stampede water was unnecessary except in a few resort areas. The feasibility report for the project stated that "in most cities [in the Washoe Project area] existing water supplies are adequate for the foreseeable future" and that "the project does not provide for increasing domestic water supplies." The report specifically considered and *rejected* M & I use for Reno and Sparks:

> In most communities the existing domestic water supplies are considered adequate for the foreseeable future. . . . Because Nevada State Law which prohibits the metering of water in a city with a population of more than 4,500, considerably more municipal water is used in Reno and Sparks than in cities elsewhere in the country of comparable size and

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[13] Since the Tribe raises these arguments solely to defend the judgment of the district court dismissing the complaint with prejudice (Pet. App. 55a-56a) and does not seek to expand the relief granted, no cross-petition is necessary. U.S. Sup. Ct. Rule 10.5. *See Thigpen v. Roberts*, 104 S. Ct. 2916, 2918 (1984); *Berkemer v. McCarty*, 104 S. Ct. 3138, 3148-3149 n. 23 (1984); *Massachusetts Mut. Life Co. v. Ludwig*; 426 U.S. 479, 480-481 (1976); 9 *Moore's Federal Practice* ¶ 204.11[3] (2d ed.).

> with comparable climatic conditions. . . . If per capita use were reduced to about 300 gallons per day, which is considered to be an ample supply, the water presently available would be adequate for the population of about 70,000 anticipated by the year 2000.

H.R. Doc. No. 181, 84th Cong., 1st Sess. at 2, 4, 17 (1955). Thus, Congress considered M & I use for Reno and Sparks, determined such use unnecessary and decided against it. Unanticipated population growth and inconsistent administrative interpretations cannot change this clear congressional intent. Moreover, the Secretary would be legally unable to sell Stampede water for such use without first obtaining congressional authorization under the Water Supply Act, 43 U.S.C. § 390b, Tribe App. 1a, which he undisputedly has not done.

Second, petitioners have no private right of action to compel reimbursement. The Reclamation Act's reimbursement provisions, 43 U.S.C. § 485-485(h), were explicitly enacted to benefit agriculture and the federal government, not power companies and water districts catering to urban business and industry. Thus, petitioners cannot satisfy the four-part test for finding a private right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See California v. Sierra Club*, 451 U.S. 287 (1981).

Finally, petitioners lack standing to compel reimbursement. Since the Reclamation Act's reimbursement provision was not enacted to benefit power companies and water districts, petitioners lack "a right to judicial relief" and have no standing under *Warth v. Seldin*, 422 U.S. 490 (1975). Petitioners' interests as taxpayers and potential water buyers are insufficient to grant them standing. *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *United States v. Richardson*, 418 U.S. 166 (1974).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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February 1985

APPENDIX

APPENDIX

The Water Supply Act of 1958

43 U.S.C. § 390b

(a) It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

(b) In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *Provided*, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further*, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further*, That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage

will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further*, That the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 relating to the same subject.

(c) The provisions of this section shall not be construed to modify the provisions of section 701-1 of Title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

(d) Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law. Pub.L. 85-500, Title III, § 301, July, 1958, 72 Stat. 319; Pub.L. 87-88, § 10, July 20, 1961, 75 Stat. 210.

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ALEXANDER L. STEVAS,
CLERK

No. 84-808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CITIES OF RENO AND SPARKS, WASHOE COUNTY, AND THE WASHOE COUNTY METROPOLITAN WATER AUTHORITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED AND STATEMENT OF THE CASE

We hereby adopt the QUESTIONS PRESENTED contained in the Petition, Pet. (i), and Petitioners' STATEMENT OF THE CASE. Pet. 3-8.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED AND STATEMENT OF THE CASE	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI*	1
REASONS FOR GRANTING THE PETITION	3
1. The Court Below Misinterpreted the Washoe Project Act	3
2. The Ninth Circuit's Ruling Ignored the Interrelationship Between the Washoe Project Act and Other Federal Reclamation Laws	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Arizona Power Pooling Ass'n v. *Morton*, 527 F.2d 721 (9th Cir. 1975) 6
California v. *United States*, 438 U.S. 645 (1978) 7
Kokosszka v. *Belford*, 417 U.S. 642 (1974) 7
Philbrook v. *Glodgett*, 421 U.S. 703 (1975) 7
Swigart v. *Baker*, 229 U.S. 187 (1913) 8
United States v. *Beebe*, 180 U.S. 343 (1901) 6

Statutes

16 U.S.C. §§ 1531 *et seq.* 2
43 U.S.C. § 390b 9
43 U.S.C. §§ 485 *et seq.* 8
43 U.S.C. § 485h 4, 8
43 U.S.C. § 498 8
43 U.S.C. §§ 614-614d 2
43 U.S.C. § 614a (a) 7
43 U.S.C. § 614a (c) 2
1983 Nev. Stat. Ch. 487 2

Miscellaneous

Bureau of Reclamation, U.S. Dep't of the Interior, *Definite Plan Report—Washoe Project, Nevada-California* (1966) 5
Hearngs on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 88 Cong., 2d Sess. pt. 2 (1964) 5
Hearings on H.R. 9220 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations, 89th Cong., 1st Sess. pt. 3 (1965) 5
Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 89th Cong., 1st Sess. pt. 2 (1965) 5
Hearings on H.R. 17787 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. pt. 2 (1966) 5-6
Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 89th Cong., 2d Sess. pt. 2 (1966) 5

TABLE OF AUTHORITIES—Continued

	Page
Hearings on H.R. 11641 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations, 90th Cong., 1st Sess. (1967)	6
Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 90th Cong., 1st Sess. pt. 2 (1967)	6
Hearings on H.R. 17903 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations, 90th Cong., 2d Sess. pt. 2 (1968)	6
Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 90th Cong., 2d Sess. pt. 2 (1968)	6
Hearings on H.R. 14159 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations, 91st Cong., 1st Sess. (1969)	6
Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 1st Sess. pt. 3 (1969)	6
H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955)	4
H.R. Rep. No. 2055, 84th Cong., 2d Sess. (1956)	4
Sup. Ct. R. 36.4	1
102 Cong. Rec. S6299-6300 (daily ed. April 26, 1956)	4

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INTEREST OF *AMICI* *

The Cities of Reno and Sparks comprise the bulk of the population in Washoe County, Nevada, and depend on the Truckee River and its tributaries as their primary source of municipal and industrial water. The Washoe County Metropolitan Water Authority (the "Authority")

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* *Amici curiae* are political subdivisions of the State of Nevada and accordingly file this brief pursuant to Sup. Ct. R. 36.4.

was created in 1983 by the Nevada Legislature to plan for the present and future use of water resources within Washoe County.[1] These entities represent the citizens of the Truckee Meadows area and are vitally interested in the allocation of the scarce resources now controlled by the Secretary of the Interior (the "Secretary") through the Stampede Dam and Reservoir, which was constructed pursuant to the Washoe Project Act, 43 U.S.C. §§ 614-614d (West 1964). Although the central purpose of the Act was to develop and conserve the resources of the region so that the available water could be used more productively, the Secretary has consistently refused to sell water to Petitioners for municipal and industrial ("M&I") use. It appears evident that the Secretary would likewise refuse to sell water to these *amici* or other entities authorized to contract for such water. The Secretary's position violates the federal reclamation laws of which the Washoe Project Act is a part and jeopardizes the existence and preservation of a reliable water supply for Washoe County and its citizens. Reno, Sparks, Washoe County, and the Authority join together as *amici curiae* because the Ninth Circuit's ruling requires the Secretary to ignore totally the congressionally mandated purposes underlying the Washoe Project Act and related federal reclamation laws.[2]

To ensure that the Project's costs would be recouped, Congress specifically directed that a water conservancy district be created and that the Secretary enter into repayment contracts prior to delivering water from Stampede. 43 U.S.C. § 614a(c). Although a repayment

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[1] 1983 Nev. Stat. Ch. 487.

[2] *Amici* concede that the Secretary's responsibility under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, to avoid jeopardizing the existence of endangered or threatened species takes priority over his duties under the reclamation laws. Although we agree with Petitioners that the courts below erred in their construction of the Endangered Species Act, *amici* are focusing only on the Ninth Circuit's interpretation of the Washoe Project Act.

contract was prepared in 1965, the Secretary has refused to honor his obligation to seek reimbursement for the Project's costs, deciding instead to use the water for non-reimbursable uses only. The Ninth Circuit agreed "that M&I use is a 'beneficial purpose' for which the Secretary is authorized to sell the project's water," Pet. App. 4a, but held that the Secretary is not *required* to do so. This holding fundamentally misconstrues the Secretary's obligations under the Washoe Project Act and related federal reclamation laws. Because access to the resources made available through federal reclamation projects such as the Washoe Project is crucial to the continued growth and prosperity of the communities like those *amici* represent, we ask this Court to grant the petition and reverse the decision below.

REASONS FOR GRANTING THE PETITION

1. The Court Below Misinterpreted the Washoe Project Act.

The Ninth Circuit, at two points in its decision, purported merely to vacate the District Court's ruling that the Secretary was obligated to sell M&I water to petitioners. *See* Pet. App. 4a-5a. At a third point in its opinion, however, the court clearly held "that the Washoe Project Act does not require the Secretary to sell water for M&I use." Pet. App. 8a n.5. The Court of Appeals based its ruling on two factors: (1) that circumstances have changed rendering irrigation an inefficient use of the Project's water; and (2) that the language of the Washoe Project Act did not require reimbursement before construction of the Project. As *amici* will demonstrate, neither consideration relieves the Secretary of his obligation to obtain reimbursement by selling the Project's water for M&I use to entities authorized to contract for such water.

Prior to the adoption of the Washoe Project Act, the Secretary undertook a comprehensive analysis of the pro-

posed Project[3]—including studies of the existing water supply, construction plans, agricultural economy and needs, repayment capability of the farmers who were expected to use the bulk of the Project water for irrigation, cost-benefit factors, and the allocation of costs among multiple uses of the Project. *See* H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955). The Secretary repeatedly represented to Congress that 86% of the Project's costs would be recouped by allocating most of the water to reimbursable functions. H.R. Rep. No. 2055, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 3755, 3760. The Senate sponsor—Senator Bible of Nevada—also made it clear to his colleagues that most of the costs associated with the Washoe Project were to be repaid to the Reclamation Fund. 102 Cong. Rec. S6299-6300 (daily ed. April 26, 1956) (remarks of Sen. Bible). Thus, both Congress *and the Secretary* clearly intended that the Federal Government be reimbursed by selling the Project's water to farmers and other users.

As the lower courts noted, circumstances changed after the Washoe Project Act was adopted in 1956. Although the Bureau of Reclamation (the "Bureau") recognized that two communities in eastern California might need M&I water from the Project at some point and requested flexibility to adjust the Project's plan accordingly, it did not foresee the rapid population growth in the Reno-Sparks area that began in the late 1950's. When it became clear that the need for M&I water exceeded the need for irrigation, the Carson-Truckee Water Conservancy

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[3] This study was undertaken pursuant to the Reclamation Project Act of 1939, 43 U.S.C. § 485h, which requires the Secretary to report to Congress on the engineering feasibility of the proposed construction, the estimated cost of the project, the amount of water allocated to irrigation that will probably be repaid by the users, and *"the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States."* 43 U.S.C. § 485h(a) (1982) (emphasis added).

District (the "District") asked the Bureau to study the need for additional M&I water and to provide for that need in the Project's Definite Plan Report.

The Report was issued in 1966 and noted:

> Earlier plans called for the project water developed on the Truckee River system to be used, by exchange, for irrigation of new land in Carson Valley. As urban and industrial development accelerated in the Reno Valley, the urgency of providing water to support this growth became evident and of great concern locally. At the same time, local interest in the planned new land irrigation in Carson Valley became more uncertain and feasibility of this part of the project became doubtful. *It was evident that project water from the Truckee River would be more beneficial when used as a municipal and industrial supply. The plan was therefore changed to include this purpose and exclude new land irrigation.* [Bureau of Reclamation, U.S. Dep't of the Interior, *Definite Plan Report—Washoe Project, Nevada-California* 3 (1966); emphasis added.[4]]

Under the revised plan, M&I sales were intended to represent the bulk of the reimbursement for the Project's costs. During the years prior to the construction of Stampede Dam in 1970, the Secretary repeatedly informed Congress of the change in circumstances and represented that distribution of the water for M&I purposes would generate substantial reimbursement payments from the District.[5]

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[4] *See also* id. at 11, 33-34.

[5] *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 2d Sess. pt. 2 at 162 (1964); *Hearings on H.R. 9220 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 89th Cong., 1st Sess. pt. 3 at 251, 253 (1965); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess. pt. 2 at 201, 203 (1965); *Hearings on H.R. 17787 Before the Subcomm. on Public Works*

The entire history of the Washoe Project—including the legislative history of the Act itself and the subsequent modification of the Project's plan—reflects an understanding by all involved that the Project was to be operated almost entirely for reimbursable purposes and that Congress intended the the Secretary to enter into repayment contracts with the District. The Ninth Circuit's reasoning that because irrigation is no longer a feasible use for the Project's water the Secretary need not obtain reimbursement by selling the water for M&I use turns congressional intent on its head. Had Congress wished to alter the obligation to obtain reimbursement when it learned that irrigation was no longer the most beneficial use of the water, it could have easily amended the Act. By leaving the reimbursement obligation intact, Congress approved the M&I use. *See United States* v. *Beebe*, 180 U.S. 343, 354 (1901); *Arizona Power Pooling Ass'n* v. *Morton*, 527 F.2d 721, 726 (9th Cir. 1975) ("Knowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification"). The mere fact that irrigation is no longer the most beneficial use of the Project's water is a slim

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Appropriations of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. pt. 3 at 186 (1966); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess. pt. 2 at 207 (1966); *Hearings on H.R. 11641 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess. 405 (1967); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 90th Cong., 1st Sess. pt. 2 at 535 (1967); *Hearings on H.R. 17903 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 90th Cong., 2d Sess. 417 (1968); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 90th Cong., 2d Sess. pt. 2 at 1006 (1968); *Hearings on H.R. 14159 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 91st Cong., 1st Sess. 2681 (1969); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess. pt. 3 at 267 (1969).

reed on which to base a ruling that the Secretary no longer needs to seek reimbursement for the Project's construction, operation, and maintenance costs—especially where Congress specifically approved of the change in utilization.

2. The Ninth Circuit's Ruling Ignored the Interrelationship Between the Washoe Project Act and Other Federal Reclamation Laws.

The second underpinning of the Ninth Circuit's decision that the Washoe Project Act does not require the Secretary to sell M&I water is that the Act "did not prohibit the Secretary from constructing the project until repayment contracts for the project had been entered into," unlike some other project authorizations. Pet. App. 5a. Although it cited 43 U.S.C. § 614a(a), which subjects the Secretary's conduct to federal reclamation laws generally, the court failed to analyze the interplay between the Washoe Project Act and the other reclamation laws by which the Act is governed.[6] Because the Act incorporates reclamation law generally, this Court should consider not only the specific provisions of the Washoe Act but also the entire reclamation structure erected by Congress. *See generally Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (courts must consider the entire statutory scheme); *Kokosszka* v. *Belford*, 417 U.S. 642, 645 (1974) (courts should look to purposes underlying the statute for guidance).

On several occasions this Court has considered the history and construction of the federal reclamation laws, *see, e.g., California* v. *United States*, 438 U.S. 645, 653-670 (1978), and the obligation to seek reimbursement for the costs of construction, operation, and maintenance,

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[6] We adopt Petitioners' argument set forth at Pet. 20-24 and offer the following to stress the importance of the relationship between a specific project authorization and the general framework of federal reclamation laws.

which can be found in the Reclamation Act of 1902, 43 U.S.C. § 498. In one of the first cases construing the Reclamation Act, this Court noted that the Reclamation Fund was to be refurbished with the proceeds of each project so that its coffers would never be empty but would always be available for new projects as needed. *Swigart* v. *Baker*, 229 U.S. 187, 197 (1913).

This reimbursement obligation was made even more explicit in the Reclamation Project Act of 1939, 43 U.S.C. §§ 485 *et seq.*, which requires the Secretary to undertake a thorough study of a proposed project's feasibility before obtaining authorization from Congress to proceed with construction. *See* 43 U.S.C. § 485h(a) (1982). The report to Congress must state how much of the cost can be allocated to reimbursable uses such as irrigation, power, and municipal supply that will *"probably be repaid by the water users."* *Id.* (emphasis added). Section 485h expressly provides that if "the repayable and returnable allocations to irrigation, power, and municipal supply or other miscellaneous purposes" equal or surpass the total estimated costs of construction, then the project "shall be deemed authorized and may be undertaken by the Secretary." If, however, the expected recoupment does not equal the expected costs, the Secretary must obtain congressional approval before constructing the project. *Id.*

Section 485h would be wholly thwarted if the Secretary could obtain project authorization through his representation that almost the entire cost would be reimbursed and then use the project solely for non-reimbursable purposes. Yet, that is precisely the effect of the Ninth Circuit's ruling in this case. The Secretary represented to Congress in his Section 485h report that 86% of the Washoe Project's costs would be repaid by the direct beneficiaries of the Project. On that basis, Congress approved the expenditure of federal funds. As it became clear that M&I use was more important to the region

than was irrigation, Congress was reassured that reimbursement would be obtained even though the most beneficial use of the water had changed. The lower court's misreading of the statutory interplay between the Washoe Project Act and the other reclamation laws to which the Act is subject grants the Secretary unreviewable discretion to ignore the congressional directive to use the water for reimbursable purposes.

The Ninth Circuit's decision also fails to consider the effect of the Water Supply Act of 1958, 43 U.S.C. § 390b. Section 390b(a) of that Act directs federal agencies to "participate and cooperate with States and local interests" in developing water supplies for domestic, municipal, industrial and other uses through the "construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." Thus, the Secretary is charged with the affirmative duty to work with local interests in preserving an adequate M&I water supply. This duty takes on special significance in this case because M&I use is the only feasible use through which the Reclamation Fund will be repaid the costs associated with the Washoe Project.

When the Washoe Project Act is read in conjunction with these related reclamation statutes, the Secretary's duty to obtain reimbursement for the Project's costs becomes clear. Accordingly, because M&I use is the most beneficial reimbursable use of the water flowing through Stampede Dam, the Secretary is obligated to enter into repayment contracts for M&I water. Only in this way can the congressional intent underlying the Washoe Project Act be effectuated.

CONCLUSION

The court below judicially repealed the repayment obligation that has been the bedrock of the country's reclamation laws for nearly a century. For this reason and for those given in the petition, *amici* urge this Court to grant the petition and to reverse the judgment of the Ninth Circuit.

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No. 84-808

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE NATIONAL WATER RESOURCES ASSOCIATION AND THE ASSOCIATION OF CALIFORNIA WATER AGENCIES

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QUESTION PRESENTED

Whether the Secretary of the Interior can foreclose the utilization of water resources under the Endangered Species Act without adhering to the specific procedures and substantive standard that are set forth in the Act.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The ESA Establishes Specific Procedures And A Clear Substantive Standard That The Secretary Must Apply When Evaluating The Permissibility Of A Proposed Federal Action Under The Act	5
II. The ESA's General "Policy" And "Purpose" Provisions Do Not Override The More Specific Procedural Requirements And Substantive Standard That Govern Evaluation Of Proposed Federal Actions	10
III. The Ninth Circuit's Decision Seriously Misapplied This Court's Decision In *TVA* v. *Hill*	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Association of American Railroads v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977) 13
D. Ginsberg & Sons, Inc. v. *Popkin*, 285 U.S. 204 (1932) 11
In the Matter of Thornhill Way I, 636 F.2d 1151 (7th Cir. 1980), *cert. denied sub nom. Mansion House Center South Redevelopment Co.* v. *United States*, 457 U.S. 1117 (1982) 12
National Wildlife Federation v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) 9
Sierra Club v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976) 9
TVA v. *Hill*, 437 U.S. 153 (1978) 8, 18, 19

Statutes:

Endangered Species Act
16 U.S.C. § 1531(b) 4, 11
16 U.S.C. § 1531(c) 4, 11
16 U.S.C. § 1532(3) 4, 11
16 U.S.C. § 1533(f) 12, 13, 17
16 U.S.C. § 1536(a) 14, 15
16 U.S.C. § 1536(a)(1) 4, 5, 6, 7, 13, 14, 15
16 U.S.C. § 1536(a)(2) 6, 7, 14, 15
16 U.S.C. § 1536(a)(3) 6, 16
16 U.S.C. § 1536(b)(3)(A) 7
16 U.S.C. § 1536(b)(4) 7

Miscellaneous:

H.R. Rep. No. 1625, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453 ..... 9, 13
H.R. Rep. No. 567, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807 ..... 15, 16
H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 9484 ..... 9, 14

TABLE OF AUTHORITIES—Continued

	Page
H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572	15
50 C.F.R. § 402.01 (1983)	7
50 C.F.R. § 402.02 (1983)	8
48 Fed. Reg. 29,992 (1983)	8
48 Fed. Reg. 29,999 (1983)	8
Sup. Ct. R. 36.1	1

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BRIEF AMICI CURIAE OF THE NATIONAL WATER RESOURCES ASSOCIATION AND THE ASSOCIATION OF CALIFORNIA WATER AGENCIES

INTEREST OF AMICI [1]

The National Water Resources Association (hereinafter, "the National Association") and the Association of California Water Agencies (hereinafter "ACWA") are nonprofit public benefit corporations organized and existing under the laws of the District of Columbia and the State of California, respectively. Members of the National Association include state water associations from the eighteen Western states who have joined together to promote the development, management and wise use of Western water resources. The state member associations include governmental and quasi-governmental units in-

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[1] Pursuant to Sup. Ct. R. 36.1, amici curiae have filed with the Clerk of the Court written consent from the parties to file this brief.

cluding cities, counties, irrigation districts, conservancy districts, and other water management agencies.

ACWA, a member of the National Association, is comprised of a total of 300 California water districts, irrigation districts, county water districts and a number of special purpose agencies, each of which is engaged in the production, transmission, sale, distribution, storage, conservation or reclamation of water in the State of California. ACWA member agencies provide 85 percent of the agricultural, domestic and industrial water delivered in California for the benefit of 21,330,825 persons and 17,343,600 acres of land.

Through its members, the National Association and ACWA are heavily engaged in contracting for water supplies from the federal government for agricultural, municipal and industrial uses. The availability of water and power supplied by the federal government is, therefore, of the utmost importance to the farms, businesses, and residents within the state organizations represented by the National Association and within ACWA's member water districts.

The Ninth Circuit's decision allows federal authorities to prohibit access to these water resources whenever the Secretary of the Interior unilaterally determines that a proposed action might not affirmatively assist the recovery of an endangered or threatened species. This ruling is inconsistent with the language, structure and history of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982) ("ESA"). If allowed to stand, the decision below will severely compromise public access to important water resources by judicially abrogating specific statutory protections that serve the interests of all citizens. As a result, the ability of the National Association, ACWA, and their members to obtain water and power supplied by the federal government will be placed in jeopardy. The National Association and ACWA, therefore, have a vital interest in obtaining Supreme Court review of this case and reversing the decision below.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth by the petitioners. Because the interests of amici curiae are broader than the specific interests of the petitioners herein, however, a brief restatement of salient facts follows.[2]

The Carson-Truckee Conservancy District and the Sierra Pacific Power Company initiated this case following a refusal by the Secretary of the Interior ("Secretary") to sell water from the Stampede Reservoir for municipal and industrial use. The Secretary based his refusal on his assertion that the removal of any water from the Stampede Reservoir may impede the ability of certain endangered and threatened fish in the Reservoir to recover to historic levels. The Secretary ruled that general provisions included in the Endangered Species Act compelled him to ban any water withdrawals from the Stampede Reservoir once he made a finding that the recovery of fish in the Reservoir might be enhanced if all water supplies were maintained in the Reservoir. The Secretary made such a finding in this case even though he failed to: (1) engage in the consultation process required by the ESA; (2) prepare a biological opinion as required by the statute; (3) evaluate alternative measures that might assist the species, as required by the ESA; or (4) evaluate whether some water could be made available for municipal or industrial use without adversely affecting the species' existence.

The District Court below affirmed the Secretary's decision and entered an order prohibiting the Secretary from making available any water stored in the Stampede Re-

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[2] Petitioners contend, for example, that the Washoe Project Act requires that the Secretary make water supplies from the Stampede Reservoir available to petitioners. Amici curiae support this contention, but amici are most concerned with the Ninth Circuit's far-reaching interpretation of the Endangered Species Act, rather than the relationship between the Endangered Species Act and the Washoe Project Act.

servoir for public use under any conditions "until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout." Pet. App. 55a.

The Ninth Circuit affirmed. The Court of Appeals ruled that the ESA's general "purpose" and "policy" provisions, which direct the Secretary to use his authority to further the conservation of threatened and endangered species, require the Secretary to take affirmative steps that might assist the recovery of endangered or threatened species. In this case, the court referenced these general provisions and affirmed the District Court's order that the Secretary may not utilize any water from the Stampede Dam until the endangered and threatened species of fish in the Reservoir no longer qualify for protection under the Act. Pet. App. 8a (referring to ESA § 2(b), (c); § 3(3) & § 7(a)(1)).

SUMMARY OF ARGUMENT

In affirming the Secretary's refusal to make water available from the Stampede Reservoir to petitioners, the Ninth Circuit seriously misinterpreted the ESA and established new precedent that threatens access by the National Association, ACWA, and their members to vitally important water resources. Indeed, the precedent set by the Ninth Circuit completely undermines the specific ESA procedural protections that require federal officials to consult with federal wildlife experts, prepare a biological opinion discussing potential impacts that a proposed action may have on endangered or threatened species, and evaluate alternative actions, before deciding whether or not a federal action can or cannot be taken under the ESA. Improperly relying on the ESA's general policy command that the Secretary take steps to assist the recovery of threatened and endangered species, the decision below permits the Secretary, by administrative fiat

and without consultation or scientific study, to close the door on any proposed federal action that would not directly result in the recovery of any endangered or threatspecies * * *.

In addition to reading the ESA's procedural protections out of the statute, the Ninth Circuit's ruling applies a radical new standard for evaluating proposed federal actions under the ESA. Relying again on the ESA's general policy provisions, and ignoring the specific standard established under the ESA for the evaluation of proposed federal actions, the Ninth Circuit's unprecedented reading of the ESA would permit the federal government to reject outright a proposed use of federally-managed resources whenever the Secretary asserts that the proposed action may not enhance the recovery of a threatened or endangered species to its historic status, even though the action may not have any adverse impact on the continued existence of the species. In so doing, the decision below converts the ESA's exhortations that the Secretary take affirmative steps to assist the recovery of species (as, for example, through the implementation of "recovery plans" under Section 4(f) of the Act), into an emasculation of the ESA's specific statutory standard that applies whenever any of the National Association's or ACWA's members request federal action in connection with the utilization of water resources.

ARGUMENT

I. The ESA Establishes Specific Procedures And A Clear Substantive Standard That The Secretary Must Apply When Evaluating The Permissibility Of A Proposed Federal Action Under The Act

Section 7(a)(1) of the ESA includes general language mandating that the Secretary of the Interior carry out his responsibilities in a way that will conserve threatened and endangered species.[3] Consistent with this gen-

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[3] In its entirety, Section 7(a)(1) states:

eral intent, Section 7(a)(2) requires that federal agencies consult with the Secretary to ensure that any proposed "agency action" is not likely to "jeopardize the continued existence" of any endangered or threatened species. The provision states, in part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any threatened or endangered species * * *.

16 U.S.C. § 1536(a)(2).

The remainder of Section 7 spells out in considerable detail the procedures that federal authorities must follow to assure compliance with this standard. Specifically, once a "prospective permit or license applicant" requests that a federal agency take a particular action (such as the granting of a right-of-way, the release of federally-controlled water, etc.), the federal agency involved "shall consult with the Secretary" to determine whether an endangered or threatened species may be present in the area affected by the proposed action. ESA § 7(a)(3), 16 U.S.C. § 1536(a)(3). Upon an initial finding that an endangered or threatened species might be present in the area, the federal agency involved must undertake formal consultation with the Secretary. Following the consultation, the Secretary must provide the federal agency with a written statement setting forth the Secre-

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> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536(a)(1).

tary's opinion, and "a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A). If a potential conflict is found, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." *Id.* That is, the Secretary must propose alternative actions that are "not likely to jeopardize *the continued existence* of any endangered species or threatened species" under Section 7(a)(2) of the Act. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (emphasis added).[4]

The ESA's standard governing the review of proposed federal actions is reiterated in regulations promulgated under the Act by the Department of the Interior. After repeating Section 7(a)(1)'s general policy of encouraging federal authorities to develop affirmative steps to assist endangered and threatened species, the regulations articulate the substantive standard applicable to the review of proposed federal actions, namely, whether the action is likely to "jeopardize the continued existence of a listed species." 50 C.F.R. § 402.01 (1983). The regulations further define the phrase, "jeopardize the continued existence of," by explaining that it covers any activity that:

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[4] If, following consultation under Section 7(a)(2) of the Act, the Secretary concludes that the agency action will not violate the section (that is, if he concludes that the action "is not likely to jeopardize the continued existence" of any threatened or endangered species) or, if the agency "offers reasonable and prudent alternatives which the Secretary believes would not violate" Section 7(a)(2), the Secretary shall provide the federal agency and the applicant with a "written statement" that "specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact." ESA § 7(b)(4), 16 U.S.C. § 1536(b)(4).

> [r]easonably would be expected *to reduce* the reproduction, numbers, or distribution of a listed species *to such an extent as to appreciably reduce the likelihood of the survival and recovery* of that species in the wild.

50 C.F.R. § 402.02 (1983) (emphasis added). That is, an activity does not "jeopardize the continued existence of" a species unless it reduces both the likelihood of survival and the likelihood of recovery of a species. The Secretary of the Interior recently explained this aspect of the Act in connection with a proposal to update the regulations under the ESA. The Secretary noted:

> Actions can adversely affect the recovery of a species but not necessarily affect the species' survival. Thus a no jeopardy opinion would be issued if a given action would not adversely affect the survival of a listed species although it may affect the species' recovery.

48 Fed. Reg. 29,992 (1983).[5]

Application of this substantive standard enables federal authorities to accommodate the need to utilize natural resources with the need, as set forth in the ESA, to protect endangered or threatened species. The ESA's legislative history makes it clear that Congress intended that the statute strike such an accommodation. Following this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), for example, Congress reexamined the ESA to determine whether Section 7 included enough flexibility to enable the accommodation of demands on natural resources and the needs of endangered and threatened species. Referencing

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[5] Although the current regulations do not leave room for doubt on this issue, proposed new regulations are even clearer. They define "jeopardize the continued existence of" to cover actions "which reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival and recovery of listed species in the wild by reducing the reproduction, numbers, or distribution of a listed species or otherwise adversely affecting the species." 48 Fed. Reg. 29,999 (1983) (emphasis added).

two Court of Appeals cases that authorized specific federal actions despite their obvious impact on certain endangered species, Congress noted that the ESA's standard is not absolute; whether an activity "jeopardizes the continued existence of" a species under Section 7 "depends upon the type and degree of impact that the activity will have on the species or its habitat." [6]

After making this observation, Congress emphasized that Section 7's procedural requirements and the statute's substantive standard are closely interrelated, thereby facilitating the accommodation of resource development and species protection. As Congress explained, proper application of the substantive standard governing proposed federal actions (*viz.*, "is not likely to jeopardize the continued existence of" endangered or threatened species) depends upon careful adherence to the statute's procedural provisions. *See* H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9462.[7]

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[6] *See* H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9461:

> Both the Indiana bat and the sandhill crane cases illustrate the fact that there is some degree of flexibility in Section 7. In the sandhill crane case the plaintiffs did not seek, and the Court did not enjoin the completion of the highway despite the fact that it bisected the sandhill crane's habitat. In the Indiana bat case the Court found that the impact of the impoundment of the bats and their habitat was not sufficiently severe to amount to a violation of Section 7. The determination of whether a particular activity violates Section 7 depends on the type and degree of impact that the activity will have on the species or its habitat.

See generally Sierra Club v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976) (the Indiana bat case); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) (the sandhill crane case).

[7] *See also* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9484, 9486 ("Many, if not most, conflicts between the Endangered Species Act and Federal

In summary, the language, regulations and legislative history of the ESA all confirm that the statute sets forth a finely-tuned regulatory structure that requires federal authorities to follow specific procedural steps in evaluating the impact that a proposed action may have on endangered or threatened species. Once the necessary procedures have been followed, the Act requires federal authorities to apply a substantive standard that examines the impact the action may have on the "existence" or "survival" of the species.

Remarkably, in this case, the Secretary of the Interior failed to follow any of these procedural steps. When evaluating a request for access to Stampede Reservoir water, the Secretary did not engage in consultation, prepare a biological opinion, or evaluate alternative actions. Moreover, in deciding whether or not to proceed with the federal action, the Secretary did not apply the ESA's substantive standard and determine whether making water available to petitioners would be likely "to jeopardize the continued existence of" an endangered or threatened species. In fact, to this date, no jeopardy determination has ever been made.

Instead, the Secretary invoked the ESA's preamble to justify a flat refusal to go forward with the proposed action. As explained below, the ESA's general provisions do not provide a statutory basis for the Secretary to override the ESA's specific procedures and substantive standard in this manner.

II. The ESA's General "Policy" And "Purpose" Provisions Do Not Override The More Specific Procedural Requirements And Substantive Standard That Govern Evaluation Of Proposed Federal Actions

In affirming the District Court's order prohibiting the utilization of Stampede Reservoir water, the Court of

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actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fishery Service, as appropriate").

Appeals relied heavily on the general "purpose" and "policy" provisions of the ESA. *See* ESA § 2(b),(c), 16 U.S.C. § 1531(b),(c); Pet. App. 6a-7a. The court also relied on the introductory language to the Act's consultation provision, Section 7(a)(1), holding that it mandated the Secretary's action, while ruling that the remainder of Section 7, including the specific procedural requirements and substantive standard, had no application to this case. Pet. App. 7a-8a.

The Court of Appeals' heavy reliance on language in the ESA's preamble (Section 2 of the Act) to create new statutory obligations under the Act, at the same time that the court ignored the ESA's specific statutory requirements and substantive standard, constitutes clear error. Sections 2(b) and (c) of the Act, which set forth the "purposes" and "policies" of the ESA in very general terms, do not supercede or otherwise override the specific procedural requirements and substantive standard that apply to the review of proposed federal acts under the ESA.[8] To so find would turn customary principles of statutory construction on their head.[9]

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[8] The preamble calls on all federal agencies "to seek to conserve endangered and threatened species" and "to provide a program for the conservation of such endangered or threatened species." 16 U.S.C. § 1531(b), (c). "Conserve" is broadly defined in Section 3(3) of the Act to include "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary * * *." 16 U.S.C. § 1532(3).

[9] It is a well-established principle of statutory construction that more specific statutory provisions override general provisions. As this Court summarized in *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932):

> General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which

On the contrary, the general language in the ESA's preamble simply exhorts federal officials to take actions and develop programs that will assist the recovery of listed species. Elsewhere in the Act, the statute provides the Secretary with more precise guidance on how to take affirmative steps to accomplish this goal. Specifically, Section 4(f) of the ESA provides a prescription describing how the Secretary should develop "recovery plans" that will implement his general obligation to conserve endangered species:

> The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

16 U.S.C. § 1533(f).[10] Neither the legislative history of

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otherwise might be controlling. *Kepner* v. *United States*, 195 U.S. 100, 125.

Accord In the Matter of Thornhill Way I, 636 F.2d 1151, 1156 (7th Cir. 1980), *cert. denied sub nom. Mansion House Center South Redevelopment Co.* v. *United States*, 457 U.S. 1117 (1982).

[10] In the legislative history that accompanied the addition of this provision to the ESA in 1978, Congress confirmed that "recovery plans" are intended to provide a framework for assisting in the recovery of endangered and threatened species, thereby implementing an "implicit" requirement in the Act. As the House Report summarized:

Section 4(f) nor the legislative history accompanying the more general "policy" or "purpose" provisions of the Act, however, provides any indication that the provisions somehow enlarge or otherwise change the more specific procedural protections or substantive standard that apply to review of proposed agency actions.[11]

The Ninth Circuit also relies heavily on Section 7(a)(1) of the Act, attempting to bifurcate its general language from the remainder of Section 7's specific implementing provisions.[12] The Court of Appeals treats Sec-

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> The bill adds a new subsection (g) to section 4 which would require the Secretary to develop and implement recovery plans for listed species. *Such plans would be designed to ensure the conservation or survival of each listed species.* Recovery teams may be appointed by the Secretary, where appropriate, to aid in developing or implementing a recovery plan for a particular species. Such plans shall be as long and as detailed as is necessary and consonant with *their purpose of providing a framework for actions directed at conserving or, at least, insuring the survival of the subject species.* Although recovery plans are implicit in the Endangered Species Act, the Act does not specifically mandate recovery plans.

H.R. Rep. No. 1625, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9469 (emphasis added).

[11] The Court of Appeals' reliance on the ESA's preamble (Sections 2(b) & (c)), rather than the specific procedures and standards applicable to proposed federal actions, reflects a fundamental error in statutory construction. As explained in a similar case:

> The EPA argument based on the language in the preamble is based on an erroneous perception of the operation and significance of such language. A preamble no doubt contributes to a general understanding of a statute, but it is not an operable part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

[12] Section 7(a)(1) provides that the Secretary and all federal agencies should further the purposes of the ESA "by carrying

tion 7(a)(1) as though it creates some unspecified duties that stand apart from the subsections that follow. The sole support for this theory is the court's holding that Section 7(a)(2) applies only when the Secretary "has undertaken" a particular project—not when he is considering whether or not to undertake a proposed action. Pet. App. 8a.

Once again, the Ninth Circuit's reasoning cannot withstand scrutiny. Section 7(a)(1) does not stand apart from the substantive standard included in Section 7(a)(2) or the remainder of Section 7. On the contrary, Congress always has joined Sections 7(a)(1) and 7(a)(2). Indeed, the two subsections appeared as a single provision until they were separated in 1979 for administrative convenience.[13] Even when renumbered, Congress

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out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title." 16 U.S.C. § 1536(a)(1). *See* n.3 *supra*.

[13] In connection with the formation of Section 7(a) in 1978, the Conference Report specifically noted that provision simply restated then-existing law:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. Conferees did restore a phrase which had been omitted from the Senate language, to clarify that Federal agencies shall consult with the Secretary to ensure that their actions do not adversely impact threatened and endangered species or their critical habitat. The conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9484, 9486.

In 1979, Congress split Section 7(a) into two provisions—the current 7(a)(1) and 7(a)(2). Congress made the split for convenience as part of a general renumbering of Section 7. The renumbering of the provision was considered so innocuous that neither the Senate, House nor Conference Reports even mentioned that

made it clear that the renumbering did not change existing law. *See* n.13, *supra*. The then-existing law recognized that Section 7 set forth an integrated consultation requirement, tested by a substantive standard that examined whether a proposed action was likely to jeopardize the continued existence of an endangered or threatened species.[14]

In view of the language of Section 7 and its legislative history, the Ninth Circuit's notion that Section 7(a)(1) applies to this case, while the remainder of the subsection does not, finds no support in the law. The Court of Appeals, however, attempted to justify its bifurcation of Section 7(a)(1) from Section 7(a)(2) by holding that the latter provision only applies after a federal project

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Section 7(a) had been divided into subsections, much less attributed any substantive significance to the administrative change. Instead, in commenting on the meaning of Section 7(a)(1) and (a)(2), Congress referred to the subsections as though they continued to be a single subsection:

> The conference report adopts the language of the House amendment to Section 7(a) pertaining to consultation by Federal agencies with the Fish and Wildlife Service and the National Marine Fishery Service. The amendment, which would require all Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice, and judicial decisions, such as the opinion in *National Wildlife Federation* v. *Coleman*.

H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2575-76.

[14] When amending the ESA in 1982, Congress again repeated its own understanding of Section 7 of the Act. As in the past, Congress did not distinguish Section 7(a)(1) from the remainder of the provision. On the contrary, Congress explained that Section 7 established specific procedures (consultation, preparation of a biological opinion, etc.) and applied a substantive standard that examined jeopardy to the "continued existence" of an endangered species. *See* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810.

has been "undertaken." Pet. App. 8a. This "justification" betrays the Court of Appeals' fundamental misreading of Section 7. As explained throughout the provision and its legislative history, Section 7's review procedures are designed to ensure that the Secretary can evaluate a request for federal action *before* it has been undertaken. *E.g.*, ESA § 7(a)(3) ("a Federal agency shall consult with the Secretary *on any prospective agency action* at the request of * * * the prospective permit or license applicant * * *.") 16 U.S.C. § 1536 (a)(3) (emphasis added).[15] The Ninth Circuit cannot brush aside Section 7's procedural protections and its substantive standard simply because a proposed action has not yet been undertaken. This is particularly true when the alleged justification for foregoing the action is based on the ESA.

The seriousness of the Ninth Circuit's error in this case is dramatized by the facts of the case. The action in question here is the contracting for and utilization of water developed at Stampede Dam and Reservoir. A contract for water developed at this federal facility was negotiated between the Carson-Truckee Water Conservancy District and the Bureau of Reclamation, but this contract has never become final because the Secretary has refused to execute it. Refusal to finalize the contract was based upon the Secretary's assertion that the water developed by Stampede Dam and Reservoir was needed for the recovery of the cui-ui fish and the Lahontan cut-

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[15] *See also* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810 ("The assessment of the potential threat of the agency action * * * begins when the agency is advised * * * that an endangered species resides in the area of the *intended project*.") (Emphasis added.) *Accord* H.R. Rep. No. 567, 97th Cong., 2d Sess. 14, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2814 ("The legislation includes a provision for early consultation during the planning stages of the project and prior to the application for a Federal license or permit, which would signal the prospective applicant when a conflict is likely to arise * * *.").

throat trout. Ostensibly, this determination was made pursuant to the ESA. However, there is no indication that the Secretary's decision was influenced by his implementation of a recovery plan for the cui-ui fish or the Lahontan cutthroat trout under Section 4(f) of the ESA.[16] Nor is this a situation where the Secretary reached his decision following consultation, preparation of a biological opinion and evaluation of alternatives, pursuant to Section 7 of the Act.

Instead, acting in *ad hoc* fashion without regard to the specific statutory requirements, the Secretary ruled (and the courts below ordered) that no water can be made available from the Stampede Reservoir until the cui-ui fish and Lahontan cutthroat trout are no longer endangered or threatened. In so doing, the Court of Appeals has created a dangerous precedent that gives the Secretary plenary authority under the ESA to ban access to water resources, even though the Act's language and intent require the Secretary to follow specific procedures and apply a prescribed statutory standard before approving or rejecting a proposed utilization of federally-controlled resources. As a result, the Circuit Court's decision poses a direct threat to the National Association, ACWA, and their members.

To illustrate, the federal Central Valley Project currently has a surplus of water available for contracting due to a Secretarial moratorium on contracting, imposed because of continuing disputes between the Bureau of Reclamation and the California State Water Resources Control Board. The total surplus available is in excess

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[16] On the contrary, a Cui-ui Recovery Plan that had been developed by the Secretary and approved by the Fish and Wildlife Service in 1978, and which recommended deepening channels in the Reservoir, planting shade trees, and other measures to help the recovery of the cui-ui fish, has never been implemented. If it had been implemented, as required by Section 4(f) of the Act, the recovery of the cui-ui fish would have been enhanced and additional water supplies from the Stampede Reservoir could be made available to petitioners.

of one million acre feet of water per year, far more water than can be developed through the operation of Stampede Dam and Reservoir. The National Association, ACWA, and their members are vitally interested in obtaining access to these waters once the current moratorium is lifted. Application of the Ninth Circuit decision to the California situation, however, would effectively preclude the availability of any of the surplus water upon a mere decision by the Secretary that the water should be used for recovery of certain listed threatened or endangered species. A decision not to contract for in excess of one million acre feet of water annually cannot be based upon such an illusory application of the ESA. Rather, and to the extent that such a decision could ever be justified, it must be based upon the proper application of the various provisions of the ESA, including the detailed procedural provisions and substantive standard found at Sections 4(f) and Section 7 of the Act.

III. The Ninth Circuit's Decision Seriously Misapplied This Court's Decision in *TVA* v. *Hill*

The Ninth Circuit's error is magnified by its serious misapplication of this Court's ruling in *TVA* v. *Hill*, *supra*. In the *TVA* case, the Secretary concluded that construction of the Tellico Dam would jeopardize the very existence of the snail darter. 437 U.S. at 161-62.[17] He reached this conclusion only after carefully following the ESA's procedural steps of consultation and evaluation of alternative actions. 437 U.S. at 162-63. This Court upheld the Secretary's conclusion under Section 7 of the ESA.

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[17] The snail darter lived in that portion of the Little Tennessee River that would be completely inundated by construction of the dam and its related reservoir. As the Secretary summarized: "The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 437 U.S. at 162.

In this case, the Secretary concluded that retaining all water in the Stampede Reservoir may enhance the recovery of two fish species in the reservoir. Unlike *TVA*, however, the Secretary did not decide whether making water available from the Stampede Dam would adversely affect the existence of the fish in the Reservoir. Also, in contrast to the procedures followed in the *TVA* case, the Secretary reached his "finding" without following the procedural steps of consultation, biological analysis, and evaluation of alternatives.[18]

Thus, in *TVA* v. *Hill*, this Court affirmed a straightforward application of the ESA after the Secretary had followed the ESA's procedures and applied the Act's substantive standard, concluding that construction of the Tellico Dam would jeopardize the existence of the snail darter. Misapplying the same precedent to much different circumstances,[19] the Court of Appeals affirmed the Secretary's decision to withhold water from the Stampede Dam even though the Secretary failed to follow ESA procedures and failed to apply the Act's substantive standard. If allowed to stand, the Ninth Circuit's decision permits the federal government to halt construction of a dam. refuse to make water available to needy municipalities or other water users, or otherwise deny access to important natural resources, based on the Secretary's untested assertion that a requested use of natural resources might not create conditions optimum to the restortation of a particular threatened or endangered species, even though there has been no finding that the proposed action would adversely affect the continued health of the species. The Ninth Circuit's decision is plainly at odds with both the ESA and this Court's prior interpretation of the statute.

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[18] The ESA was amended in 1978 and 1979, following the *TVA* decision, to spell out in even greater detail the procedural steps that the Secretary must follow when evaluating the permissibility of a proposed action under the ESA.

[19] *See* Pet. App. 7a-8a.

CONCLUSION

Because the Ninth Circuit's decision seriously misinterprets the ESA and prior decisions of this Court, to the detriment of the National Association, ACWA, their members, and all citizens, amici curiae respectfully request that the Court issue a writ of certiorari and reverse the decision below.

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No. 84-808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT and
SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* ARIZONA, HAWAII, IDAHO, NEBRASKA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING, AND TEXAS DEPARTMENT OF WATER RESOURCES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Endangered Species Act requires the Secretary of Interior to restore listed species to original population levels by utilizing resources authorized by Congress for reclamation purposes where the intent of the reclamation statute can be achieved without jeopardizing the continued existence of endangered species.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI*	1
REASONS FOR GRANTING THE WRIT	3
1. The Ninth Circuit Court of Appeals Erred in Approving the Secretary of Interior's Actions in the Instant Case Because the Secretary Lacked Authority to Carry Out Those Actions	3
2. The Standard Approved by the Court Below of Requiring Restoration of Endangered Species in Reviewing Agency Actions is Contrary to the Decisions of this Court and Other Circuit Courts of Appeals	6
3. The Decision Below Conflicts with Sound Public Policy	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

California v. *United States*, 438 U.S. 645 (1978) 2
National Wildlife Federation v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) 7
North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 7
Roosevelt Campobello Int'l Park Comm'n v. *Environmental Protection Agency*, 684 F.2d 1041 (1st Cir. 1982) 7
Sierra Club v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976) 7
Tennessee Valley Authority v. *Hill*, 437 U.S. 153 (1978) 5, 7

Statutes

Reclamation Act, 32 Stat. 388 (1902) 2
16 U.S.C. §§ 528-529 8
16 U.S.C. §§ 1531 *et seq.* .... *passim*
23 U.S.C. §§ 101 *et seq.* 8
43 U.S.C. §§ 614-614(d) .... *passim*

Miscellaneous

Fish and Wildlife Service, U.S. Dep't of Interior, *Endangered and Threatened Wildlife and Plants* (July 20, 1984) 9
S. Rep. No. 97-418, 97th Cong., 2d Sess. (1982) 9

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INTEREST OF *AMICI*

Amici curiae herein are vitally concerned with the proper use and conservation of all natural resources. Acting alone, and in concert with the Federal Government, *amici* have created and are administering numerous programs aimed at wise resource management. Among the most important of these programs are those that pro-

vide for the proper allocation and beneficial use of water and those aimed at protecting plants and animals threatened with extinction.

In 1902, Congress enacted the Reclamation Act, which was intended to harness western waters and reclaim arid western land. 32 Stat. 388 (1902). Projects constructed under the Act are located in each of the *amici* States. Such projects consist of diversion dams, storage reservoirs and other water works, which have developed significant water supplies currently being used in the West. Fundamental to the reclamation program is its reliance on state law to govern rights to the water developed by these reclamation projects. *See California* v. *United States*, 438 U.S. 645 (1978).

In 1956, Congress enacted the Washoe Project Act, 70 Stat. 775 (codified as amended at 43 U.S.C. §§ 614-614(d)), a reclamation law authorizing construction of the Stampede Dam and Reservoir on the Little Truckee River. Congress intended that the water stored by the dam be used for reimbursable purposes such as irrigation, power generation, and municipal, industrial and domestic water supply. These uses are referred to as reimbursable because water users are required to contract with the Bureau of Reclamation to repay their share of construction, operation, and maintenance costs associated with the project.

The Carson-Truckee Water Conservancy District negotiated a contract with the Bureau of Reclamation for repayment of reimbursable project costs for the Stampede Dam. The contract was never signed by the Secretary of Interior, however, and the Secretary has refused to honor its provisions. In fact, since completion of the Stampede Dam as a reclamation project, the Secretary has refused to use any of the water developed by the dam for reimbursable purposes. Instead, the water has been allocated entirely for protection of two endangered or threat-

ened species, the Lahontan cutthroat trout and the cui-ui sucker.

The Ninth Circuit approved the Secretary's refusal to make any water available for reimbursable purposes and held that no water could be used for those purposes, at least until the two species have been restored and delisted. This decision misread federal law. Moreover, the court's ruling may have a significant, adverse impact on reclamation projects throughout the West. In particular, the holding could affect the relationship between the Endangered Species Act and other federal statutes in such a way that funds authorized for any of a number of specific purposes will be used solely to rehabilitate endangered species. For these and other reasons the *amici* feel compelled to urge this Court to grant Nevada's petition for a writ of certiorari and reverse the Ninth Circuit's decision.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals Erred in Approving the Secretary of Interior's Actions in the Instant Case Because the Secretary Lacked Authority to Carry Out Those Actions.

In its ruling below, the Ninth Circuit Court of Appeals upheld the Secretary of Interior's decision to manage water from the Stampede Dam solely for the enhancement of habitat for the cui-ui and Lahontan cutthroat trout, two endangered or threatened fish species. The court referred to Section 7(a)(1) of the Endangered Species Act, which requires the Secretary of Interior to review programs administered by him and to "utilize such programs in furtherance of the purposes of this chapter" and Section 2(c)(1) of the Act, which declares as policy that all federal agencies should "seek to conserve endangered and threatened species and * * * utilize their authorities in furtherance of the purposes of this chapter." Section 3(3) defines "conserve" as using "all meth-

ods and procedures * * * necessary to bring any endangered * * * or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. §§ 1536(a)(1), 1531(c)(1), 1532(3). The court reasoned that the Act imposed a duty on the Secretary to utilize all resources authorized for reclamation purposes for the sole purpose of species restoration.

The flaw in this reasoning is that the Endangered Species Act instructs the Secretary with regard to his "programs" and "authorities." Nowhere in the Act is the Secretary authorized, much less directed, to convert resources authorized for reclamation purposes in order to rehabilitate endangered species. The Secretary simply is not empowered to utilize resources authorized for specific purposes under one statute, the Washoe Project Act in this instance, for the entirely different purpose of species restoration, where these resources can be used for the purpose for which they were intended without jeopardizing the continued existence of endangered species. This reclamation use is consistent with the mandate in the Endangered Species Act that "[e]ach agency shall * * * insure that any action authorized, funded or carried out by such agency * * * *is not likely to jeopardize* the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2) (emphasis added). Not only does the Endangered Species Act not contain an independent sanction for a program of species restoration at the expense of the Secretary's other statutory responsibilities, but clearly there was no reason for the Court of Appeals to create one in this case. As explained below, there already existed a program administered by the Secretary to further the purposes of the Endangered Species Act with regard to these particular species.

Secretarial authority to conserve the cui-ui and Lahontan cutthroat was established by Congress when it enacted the Washoe Project Act in 1956. As part of that

Act, Congress directed the Secretary to provide facilities for increased water releases from Lake Tahoe and to restore the Pyramid Lake fishery. Pursuant to this directive, the Secretary built a fish hatchery for the enhancement of the Pyramid Lake fish population, constructed the Marble Bluff Dam for fish flow regulation in the Truckee River, and built the Pyramid Lake fishway. Congress provided a $2 million expenditure for fishery enhancement out of a project budget of $52 million. 43 U.S.C. §§ 614(c), 614(d).

This program gives the Secretary authority to rehabilitate the Pyramid Lake fishery and to conserve and protect the cui-ui and Lahontan cutthroat trout. If the Secretary wishes this program to be enhanced, the appropriate recourse is to the Congress, not to the reclamation program. This is the type of program and authority envisioned by the provisions in the Endangered Species Act requiring the Secretary to use his programs and authorities to conserve endangered species. General statements contained in the "Policy" or "Purposes" sections of the Act (*i.e.*, Section 2(c)(1) as quoted above) do not add to the Secretary's authority.

This Court's decision in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), is not to the contrary. In that case, the Government could build the Tellico Dam and destroy the snail darter or not build the dam and leave the snail darter's habitat intact. *Id.* at 171. In disallowing construction of the dam, this Court did not interpret the Endangered Species Act to provide any federal official with the authority to use resources associated with the construction of the dam *to enhance* the snail darter population.

Here the Secretary is not forced to choose between two mutually exclusive courses of action, *i.e.*, utilize the Stampede Dam for reclamation purposes as Congress directed *or* protect endangered species from jeopardy. The issue, rather, concerns the extent of the Secretary's

obligation to restore the cui-ui and Lahontan cutthroat under the Endangered Species Act in view of the Secretary's responsibilities under the Reclamation Act. In this case, the Washoe Project Act provides the Secretary with authority to take actions to restore the two fishes, and it defines the Secretary's responsibilities under the Reclamation Act. These responsibilities are fully compatible: water *can be withdrawn* from Stampede Dam for reimbursable purposes *without jeopardizing* the continued existence of the cui-ui or the Lahontan trout.

Nevertheless, the Ninth Circuit allowed the Secretary to disregard his responsibilities under the Washoe Project Act to develop water for reclamation purposes. The court approved the Secretary's actions in converting Stampede Dam into a rehabilitation project for the cui-ui and Lahontan cutthroat. This result is contrary to both the Washoe Project Act and the Endangered Species Act. For this reason, this Court should grant Nevada's petition for certiorari to review the Ninth Circuit's decision.

2. The Standard Approved by the Court Below of Requiring Restoration of Endangered Species in Reviewing Agency Actions is Contrary to the Decisions of this Court and Other Circuit Courts of Appeals.

In the decision below, the Ninth Circuit established a standard under the Endangered Species Act that is in direct conflict with the standard required by the Act and implemented by this Court. The court below concluded that the Endangered Species Act sanctioned a federal agency's action to restore a species with resources intended for or generated by a federal reclamation project at the expense of the congressionally established purposes for which the project was intended. In contrast, this Court and other circuit courts of appeals have reviewed agency actions in question against the congressional directive that such actions not jeopardize the continued

existence of endangered species. In fact, in adopting a standard of restoration, as opposed to the absence of jeopardy, the Ninth Circuit stands alone.

No other court has ruled that federal agencies have a duty to marshall authorities and resources for restoration of endangered species at the expense of their primary statutory responsibilities. Instead, in *TVA* v. *Hill*, this Court applied the standard requiring "all federal agencies 'to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species" 437 U.S. at 173 (quoting 16 U.S.C. § 1536; emphasis by the Court).

Likewise, other courts of appeals have based their rulings on the principle that the Act requires federal agencies to insure that their actions will not jeopardize listed species. *See, e.g., Roosevelt Campobello Int'l Park Comm'n* v. *Environmental Protection Agency*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607, 609 (D.C. Cir. 1980); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-04 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976).

Consideration of the consequences of interpreting the Act to impose a duty on federal agencies to restore species using resources authorized for other purposes illustrates why agency actions have instead been scrutinized as to their potential jeopardy. A duty of restoration would essentially convert every federal authorizing statute that might affect endangered species habitat into an "Endangered Species Rehabilitation Act." Congress did not intend this result. Congress intended that its directives be carried out in concert with the goal of conserving endangered species by assuring that federal agencies, while engaged in carrying out their primary missions, take the steps necessary to insure that their actions

not jeopardize the continued existence of endangered species. The decision below to the contrary should be reviewed by this Court and reversed.

3. The Decision Below Conflicts with Sound Public Policy.

The Ninth Circuit's ruling in this case would require the Secretary of Interior to manage other reclamation projects that affect the critical habitat of endangered species in a fashion similar to Stampede Dam. His discretion in such management would apparently be limited only by his judgment as to the steps necessary to rehabilitate affected species.

Since the Endangered Species Act directs all federal officials to "utilize their authorities in furtherance of the purposes" of the Act, 16 U.S.C. § 1536(a)(1), the Ninth Circuit's ruling reaches beyond the Secretary of Interior to the heads of other federal agencies. Thus, funds authorized to carry out such federal acts as the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-529, the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.*, and numerous others, could be used by federal administrators solely to rehabilitate endangered species populations. Congress did not contemplate such a result. This is especially true with regard to the development of water resources.

The Endangered Species Act states:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2). Congress clearly intended that federal agencies involved in water resource development undertake to protect endangered species while carrying out their primary missions.

Sound public policy requires that federal agencies comply with congressional mandates in a manner that will

not jeopardize the existence of endangered and threatened species. Where there is no conflict between the federal agency's primary mission and continued existence of an endangered species, the agency should have neither the duty nor the discretion to ignore specific congressional directives. In most cases, careful planning will allow both objectives to be met. In this regard the legislative history of language from the Endangered Species Act quoted in the paragraph above is instructive. The committee report on the language states:

> [T]he purpose of the amendment is to recognize the individual States' interest and, very often, the regional interest with respect to water allocation * * *. [T]his amendment recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, state and Federal authorities.

S. Rep. No. 97-418, 97th Cong., 2d Sess. 25 (1982).

Amici support restoration of endangered and threatened species. However, *amici* believe that resources for such restoration should come by way of specific congressional authorizations, not through unilateral reallocation of resources by a federal agency.

In July of 1984, the Department of Interior released an updated list of endangered and threatened species. The list includes nearly 60 endangered or threatened *fishes* alone. Over half of these have a historic range that includes one or more Western States. Fish and Wildlife Service, U.S. Dep't of Interior, *Endangered and Threatened Wildlife and Plants* 17-18 (July 20, 1984). Development of water resources nearly always affects stream flow. With endangered species located in many western lakes and streams, it seems certain that water resource development will continue to present a potential impact on endangered species. The Ninth Circuit holding in the

instant case ignores needs and uses for water other than species rehabilitation. The decision also disregards the will of Congress in enacting the Washoe Project Act. The ruling is contrary to the interests of sound public policy and should be reviewed by this Court.

CONCLUSION

For the above reasons, *amici* urge this Court to grant Nevada's petition for a writ of certiorari and reverse the decision of the Court of Appeals.

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No. 84-808

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether Section 7(a)(1) of the Endangered Species Act, 16 U.S.C. 1536(a)(1), authorizes the Secretary of the Interior to utilize Stampede Dam on the Little Truckee River to conserve endangered and threatened species of fish in Pyramid Lake.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 10

Conclusion 24

TABLE OF AUTHORITIES

Cases:

Chemehuevi Tribe v. *FPC*, 420 U.S. 395 15

National Wildlife Federation v. *Coleman*, 529 F.2d 359, cert. denied, 429 U.S. 979 18

Nevada v. *United States*, 463 U.S. 110 ..... 2, 3, 18

North Slope Borough v. *Andrus*, 642 F.2d 589 17

Philbrook v. *Glodgett*, 421 U.S. 707 15

Roosevelt Campobello International Park Comm'n v. *EPA*, 684 F.2d 1041 17

Sierra Club v. *Froehlke*, 534 F.2d 1289 17-18

TVA v. *Hill*, 437 U.S. 153 ..... 7, 10, 16, 17, 21, 22, 23

United States v. *Truckee—Carson Irrigation District*, 649 F.2d 1286, as amended, 666 F.2d 351, aff'd and rev'd, 463 U.S. 110 3

Page

Statutes:

Endangered Species Act, 16 U.S.C. 1531 *et seq.* 3

§ 2(b), 16 U.S.C. 1531(b) 7, 13

§ 2(c), 16 U.S.C. 1531(c) 7, 15

§ 2(c)(1), 16 U.S.C. 1531(c)(1) 13

§ 3(3), 16 U.S.C. 1532(3) 7, 13, 14, 16, 21

§ 3(6), 16 U.S.C. 1532(6) 3

§ 3(20), 16 U.S.C. 1532(20) 3

§ 7, 16 U.S.C. 1536 16

§ 7(a)(1), 16 U.S.C. 1536(a)(1) 12, 14, 15, 18, 21

§ 7(a)(2), 16 U.S.C. 1536(a)(2) 6, 9, 10, 11, 12, 15, 17

§ 7(b), 16 U.S.C. 1536(b) 19

§ 7(b)(3), 16 U.S.C. 1536(b)(3) 12

§ 7(c), 16 U.S.C. 1536(c) 19

Washoe Project Act of 1956, 43 U.S.C. (1970 ed.) 614 et seq. :

43 U.S.C. (1970 ed.) 614 ..... 4, 20, 22

43 U.S.C. (1970 ed.) 614-614d 4

43 U.S.C. (1970 ed.) 614a 5

43 U.S.C. (1970 ed.) 614c 22, 23

Page

Miscellaneous:

32 Fed. Reg. 4001 (1967) 5

35 FEd. Reg. 16047 (1970) 3, 5

40 Fed. Reg. 29863 (1975) 3

H.R. Rep. 2055, 84th Cong., 2d Sess. (1956) 4, 22

H.R. Rep. 93-412, 93d Cong., 1st Sess. (1973) 16

H.R. Rep. 95-1625, 95th Cong., 2d Sess. (1978) 17

H.R. Rep. 96-167, 96th Cong., 1st Sess. (1979) 17

S. Rep. 1869, 84th Cong., 2d Sess. (1956) 4

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 741 F.2d 257. The October 4, 1982 opinion of the district court (Pet. App. 37a-54a) is reported at 549 F. Supp. 704, and the February 16, 1982 opinion of the district court (Pet. App. 23a-36a) is reported at 537 F. Supp. 106. The district court's opinion of August 27, 1979 (Pet. App. 11a-22a) is unreported.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1984 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a dispute over the current operation by the Secretary of the Interior of the Stampede Dam and Reservoir. The Stampede Dam is located on the Little Truckee River in California. The Little Truckee flows into the Truckee River and is part of the Truckee River basin, which occupies approximately 2,730 square miles in California and Nevada. The Truckee River, upon leaving Lake Tahoe, flows in a northerly direction, where it is fed by the tributary inflow of Donner Creek, Martis Creek, Prosser Creek, and the Little Truckee River before entering the Truckee Meadows area. A large portion of the river flow is diverted for municipal, industrial and domestic uses and irrigation in the Truckee Meadows area. After leaving the Truckee Meadows, the River proceeds, with minor inflows and diversions,[1] to the Derby Diversion Dam, where approximately 40% of the mean annual flow is diverted into the Truckee Canal for eventual distribution to the Newlands Reclamation Project. Water not diverted at Derby Dam then passes through Marble Bluff Dam[2] to its terminus, Pyramid Lake. The Truckee River is the only permanent stream flowing into the Pyramid Lake basin, and the water level of Pyramid Lake is almost entirely dependent upon Truckee River inflow to counterbalance evaporation and see page. R. 289A.

Historically, Pyramid Lake was one of the premier fisheries in North America. See *Nevada* v. *United States*, 463 U.S. 110 (1983). It supplied enormous quantities of both Lahontan cutthroat trout and cui-ui to generations of Indians and served as a mainstay not only for the Pyramid Lake

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[1]Before leaving Truckee Meadows, the remaining Truckee River flow is increased by agricultural return flows, effluent from the Reno-Sparks Joint Water Pollution Control Plant, and intermittent inflows from Washoe Lake via Steamboat Creek.

[2]Marble Bluff Dam is a structure for fishery enhancement and control of upstream channel and bank erosion.

Indians but also for other tribes in western Nevada. However, since this very productive period, upstream diversions and drought conditions have altered the Lake dramatically. This decline was described as follows by the Ninth Circuit in *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, 1292 (1981), as amended, 666 F.2d 351 (9th Cir. 1982), aff'd in part and rev'd in part by this Court in *Nevada* v. *United States*, 463 U.S. 110 (1983):

> Pyramid Lake's fishery continued to be productive through the first part of the century. Around the time of the Orr Ditch evidentiary hearing [1919-1921], however, the [Newlands Reclamation] Project's diversion of "almost the whole volume of the Truckee River" into another watershed, began to tell. The level of the lake began to drop. This, in combination with refuse from upstream sawmills, built up a delta at the mouth of the Truckee River. In 1921 Lorenzo Creel, a Special Supervisor in the Indian Service, had to arrange a special spill of water from Derby Dam to enable the Lake's trout to pass the delta. Without the additional water, the fish were unable to reach their upstream spawning grounds.

As a result of these conditions, the cui-ui and the Lahontan cutthroat trout that once abounded in the Lake and River are now classified under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, as an "endangered species" and "threatened species," respectively.[3] The cui-ui is a member

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[3]The Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A threatened speices is defined as any ~~speices~~ species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). The Lahontan cutthroat trout was originally listed as an endangered species (35 Fed. Reg. 16047 (1970)), but it is now listed as threatened. 40 Fed. Reg. 29863 (1975).

of the sucker family. There are presently three surviving species within the genus (Chasmistes), but the cui-ui is the only species that remains in pure form. The cui-ui were able to avoid extinction by reproducing in areas of small fresh water inflow. The present number of cui-ui in Pyramid Lake is but a small percentage of the historical population. R. 296.

The Lahontan cutthroat trout is a member of the salmon and trout family (Salmonidae). The Lahontan trout is currently found throughout its native range (east-central California and northern Nevada) and outside of its native range in several small streams. However, the number and size of the populations and their habitats all are degraded from those that previously existed. By 1940 the trout had disappeared from the Lake but were saved from extinction by the transplantation of eggs to other similar environments. The current population of the trout is but a small percentage of the numbers that inhabited Pyramid Lake at the turn of the century.

2. The Stampede Dam and Reservoir are part of the Washoe Reclamation Project authorized by the Washoe Project Act of 1956. 43 U.S.C. (1970 ed.) 614-614d, reproduced at Pet. App. 145a-149a. Congress authorized the project for flood control, irrigation, drainage, storage, power generation, development of fish and wildlife, and other beneficial purposes. 43 U.S.C. (1970 ed.) 614. The Act does not expressly provide for operation of the Project for municipal and industrial water supply (M&I) purposes. Congress contemplated when it authorized the Project that most of the construction costs would be reimbursed through the irrigation, drainage, and hydroelectric aspects of the Project,[4] but the Act did not require the Secretary to enter

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[4]See H.R. Rep. 2055, 84th Cong., 2d Sess. 3, 7, 13, 16, 17 (1956); S. Rep. 1869, 84th Cong., 2d Sess. 9, 11, 17-18 (1956).

into repayment contracts as a prerequisite to construction of the dam. See 43 U.S.C. (1970 ed.) 614a.

In 1966, citing the immediate need for flood control for the protection of Boca Dam and the Reno-Sparks area, the Secretary ordered construction of Stampede Dam to begin even though reimbursement contracts had not been executed (Pet. App. 26a). In 1967, the Secretary declared the cui-ui to be an endangered species, 32 Fed. Reg. 4001 (1967), and he subsequently gave a similar designation to the Lahontan cutthroat trout, 35 Fed. Reg. 16047 (1970).

In 1969, one year prior to the completion of the dam, the Secretary announced that it would not be used for M & I purposes, as previously had been anticipated.[5] Instead, the Secretary directed that until competing water right claims on the Truckee and Carson River systems were resolved, the dam and reservoir would be used only for flood control, fish and wildlife benefits, and recreation. The dam was completed in 1970, and it has been operated since that time only for these purposes. Pet. App. 26a-27a.

3. Petitioners filed this action in the United States District Court for the District of Nevada in October 1976, seeking to compel the Secretary to sell water from Stampede Dam for M & I purposes. The Pyramid Lake Paiute Tribe was permitted to intervene. To facilitate resolution of the case, the district court divided it into two phases. In

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[5]In February 1965, prior to construction of Stampede Dam, the United States and petitioner Carson-Truckee Water Conservancy District entered into a contract under which the United States would deliver water in return for repayment of a substantial portion of the costs of the Project. That agreement provided, however, that it would not be effective until the parties agreed to a supplemental contract regarding allocation of repayment costs of Stampede Dam. Pet. App. 12a-13a. The requisite supplemental agreement has not been executed by the Secretary. Pet. App. 24a.

Phase I (Pet. App. 23a-36a), the court considered the various legal defenses raised by the Secretary and the Tribe. The court held that petitioners have standing to bring the action and have a right of action under the reclamation laws and the Administrative Procedure Act to seek judicial review of the Secretary's determination not to sell water at this time to obtain reimbursement for the cost of the Project (Pet. App. 28a-32a). The court also rejected the Tribe's contentions that the Secretary is not obligated to obtain reimbursement for the Project and is not authorized to sell water from Stampede for M & I uses (*id.* at 33a-35a), holding that the Secretary is "obligated to sell all of the Stampede waters not required to fulfill his obligations under the Endangered Species Act" (*id.* at 35a).[6]

In Phase II (Pet. App. 37a-54a), the district court held that the Secretary did not abuse his discretion in his operation of Stampede Dam. The court observed that petitioner "[did] not deny that the Secretary has obligations to the Tribe and under the Endangered Species Act which take precedence over his obligation to store water for municipal and industrial (M & I) use," but that petitioners contended that "there is sufficient water for M & I storage after the water requirements under the Endangered Species Act have been satisfied" (Pet. App. 42a). The court disagreed with the latter assertion.

The district court first rejected petitioners' argument that the Secretary's only obligation under the Endangered Species Act is that imposed under Section 7(a)(2), 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that any action it authorizes, funds, or carries out is not likely "to jeopardize the continued existence of any endangered

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[6]The district court also rejected the argument by petitioner State of Nevada that the Secretary's current operation of the dam requires him to obtain a water permit from the State of Nevada (Pet. App. 35a-36a).

species" or result in the destruction of a "critical" habitat of such species. Petitioners argued that this provision permits the Secretary to utilize only that amount of water necessary to prevent the extinction of endangered species (Pet. App. 44a-45a). The court concluded, however, that other provisions of the Endangered Species Act impose obligations on the Secretary that go beyond merely refraining from causing extinction and impose an affirmative obligation on him to seek to "conserve" endangered species, which the Act defines as the use of all methods and procedures necessary to bring any endangered or threatened species to a point where the measures prescribed by the Act are no longer necessary. See Pet. App. 43a-46a, citing Sections 2(b)-(c) and 3(3) of the Act, 16 U.S.C. 1531(b)-(c) and 1532(3). The court found this interpretation of the Act to be supported by this Court's conclusions in *TVA* v. *Hill*, 437 U.S. 153 (1978), that "[t]he plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost," and that Congress has made "a conscious decision * * * to give endangered species priority over the 'primary missions' of federal agencies" (Pet. App. 45a, quoting 437 U.S. at 184-185 (emphasis supplied by the court of appeals)).

The district court also concluded that the Secretary's plan for operating Stampede to conserve the cui-ui and Lahontan cutthroat trout is supported by substantial evidence. The court found that large flows of water in the lower Truckee River are required during the spawning season for the cui-ui, which generally occurs from mid-March through June, because large flows: (1) attract the fish to the mouth of the fishway; (2) maintain the river water at a cooler temperature, which results in greater migration, hatching, and survival of larval cui-ui; and (3) prevent spawners and larval cui-ui from being stranded in the River and dying before they return to Pyramid Lake (Pet. App. 48a-49a).

Similarly, the court found that although the natural spawning grounds of the Lahontan cutthroat trout in the upper Truckee are now inaccessible by virtue of Derby Dam, large flows of cool water in the lower Truckee nevertheless are required during the spawning period to attract the spawners to the fishway, where they are captured for several trout hatcheries. On this basis, the court found that the timely release of substantial water flows from Stampede Dam during the spawning season is "essential" to the Secretary's fishery program (Pet. App. 48a).

By contrast, the court found that petitioners' alternative proposal to permit releases for M & I purposes would not meet even petitioners' own view of the requirements of the Endangered Species Act, because their proposal "would jeopardize the existence of the cui-ui and hasten their extinction" (Pet. App. 50a). Petitioners' alternative plan called for release of some water for M & I uses and provided for protection of the fish by planting shade trees along miles of the River to reduce the water temperature, confining the River to a single channel, and constructing hatcheries (*id.* at 9a). The court found, however, that this plan would provide for the release of water only in small quantities, principally outside the spawning season, and would reduce the average river flow during the spawning season, when large flows are necessary, to a level 20% below that which existed even before Stampede Dam was built — a time when the cui were practically extinct (*id.* at 50a). The court also found that water releases for the fishery in certain dry years might require all of the water from Stampede Dam, leaving none for M & I users. Against this background, the court determined that "it is not feasible to operate Stampede Dam for both M & I and fishery purposes" (*ibid.*). Accordingly, the district court entered judgment in favor of the Secretary, concluding that "his operation of Stampede for the benefit of the Pyramid Lake cui-ui fish and the Lahontan cutthroat

trout is reasonable and proper and does not constitute an abuse of discretion" (*id.* at 54a).

3. The court of appeals affirmed in part and vacated in part (Pet. App. 1a-10a). The court rejected petitioners' contention that the Secretary is authorized by the Endangered Species Act to take only those actions necessary to avoid "jeopardizing" the continued existence of an endangered or threatened species and does not authorize him to take affirmative measures in the operation of a project such as Stampede Dam to rehabilitate such a species (*id.* at 6a-8a). In the court's view, this reading of the Endangered Species Act "would lead to a result at odds with the statute's clearly stated objectives" (*id.* at 6a). Like the district court, the court of appeals read provisions of the Act other than Section 7(a)(2), upon which petitioners solely relied, to provide for the Secretary to "actively pursue a species conservation policy" (*id.* at 7a). Thus, the court held that the Endangered Species Act supports the Secretary's decision to operate Stampede Dam in such a manner as to give priority to conservation of the cui-ui and trout and not to sell project water for M & I uses at this time.

The court of appeals also sustained the district court's holding that the Secretary did not abuse his discretion in rejecting petitioners' alternative plan that would have provided for the operation of Stampede Dam for both M & I and fishery purposes. Because the court of appeals held that, under the Endangered Species Act, the Secretary is permitted at this time to use all of the project water to conserve the two species of fish, it concluded that it "need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future" (Pet. App. 5a). Accordingly, the court of appeals vacated the district court's decision insofar as it held that the Secretary is obligated to sell for M & I purposes any water that is not needed to fulfill his obligations under the Endangered Species Act (*ibid.*; see *id.* at 35a).

ARGUMENT

The decision of the court of appeals is correct and is supported by this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), and by the legislative history of subsequent amendments to the Endangererd Species Act. Nor is there any conflict with the decision of any other court of appeals. The courts below simply sustained the Secretary's exercise of his discretion in the particular circumstances presented to operate Stampede Dam in a manner that promotes the conservation of the cui-ui and Lahontan cutthroat trout. This case therefore presents no question concerning what measures, if any, a court may compel the Secretary to take in this regard where he has exercised his discretion in some other manner. Nor, contrary to petitioners' extravagant assertions, does the decision below impose rigid and radical new obligations on the Secretary or other federal officials, resolve questions regarding the operation of any reclamation projects other than Stampede Dam, or dispense with the repayment principle under the reclamation laws. What is more, both courts below concluded that petitioners' alternative plan for operation of Stampede Dam to make some water available for M & I purposes would not even satisfy petitioners' own view of the requirements of the Endangered Species Act, because it would jeopardize the continued existence of the cui-ui. Further review therefore is not warranted.

1. Petitioners contend (Pet. 8-13) that the Secretary's authority to implement the Endangered Species Act with respect to the Washoe Project is limited to taking only those measures that are necessary under Section 7(a)(2) of the Act to insure that the operation of the Project "is not likely to jeopardize the continued existence of any endangered or threatened species" (16 U.S.C. 1536(a)(2)). In petitioners' view, not only is the Secretary not required to do any more than this for the benefit of the endangered and threatened

species in Pyramid Lake; he is not even *permitted* to do so. Instead, they maintain, the Secretary is required to devote to M & I use all water stored by Stampede Dam that is not needed to prevent jeopardizing the fish.

Of course, even if petitioners were correct in their interpretation of the Act, it does not appear that any water could be made available for M & I use. The district court concluded that "it is not feasible to operate Stampede Dam for both M & I and fishery purposes" (Pet. App. 50a). The district court also found that petitioners' alternative plan for operating the Project in a way that would permit some releases for M & I consumption would violate Section 7(a)(2) because it "would jeopardize the existence of the cui-ui and hasten their extinction" (Pet. App. 50a). The court of appeals affirmed that holding (*id.* at 8a-10a), and petitioners do not challenge it here. Nor have they proposed any other plan that would insure that the cui-ui would not be jeopardized. In the absence of a concrete plan before the Court that meets even the minimum requirements of the Act, there is no ripe controversy regarding permissible alternatives for the operation of Stampede Dam, and it is questionable whether the broader issues petitioners seek to raise concerning the scope of the Secretary's discretion in implementing the Endangered Species Act are even properly before the Court.

Moreover, the Court should not attempt to resolve these questions in the abstract, without the benefit of a record concerning a proposal for operating Stampede Dam that does provide for releasing some water for M & I purposes and yet at least succeeds in insuring that the cui-ui will not be jeopardized. If the Secretary rejected such a proposal, the Court then would have the benefit of his reasons for doing so and supporting evidence. Nothing in the decision below forecloses petitioners from submitting such a proposal if they should develop one. If they do so and it is

rejected by the Secretary and the courts below, there will be time enough for this Court to consider these issues.[7]

2. a. In any event, petitioners' contention that the Secretary's authority under the Endangered Species Act is limited to insuring that his actions with respect to the Washoe Project are not likely to jeopardize the existence of an endangered species is refuted by the explicit language of a number of provisions of the Act and is directly contrary to its entire thrust. The "no jeopardy" requirement of Section 7(a)(2), upon which petitioners rely, represents the bare minimum that any federal agency must do to carry out its responsibilities under the Act. However, the immediately preceding provision, Section 7(a)(1), furnishes the Secretary and the heads of other agencies with additional authority: it provides for them to take affirmative measures to enhance the status of an endangered or threatened species. Section 7(a)(1), 16 U.S.C. 1536(a)(1), provides:

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[7]Petitioners apparently contend (Pet. 10 & n.3, 12) that the Secretary should pursue the consultation process provided for in Section 7(a)(2) of the Act in order to develop an alternative operating plan. However, Section 7(a)(2) requires consultation with the Secretary by a federal agency when the *agency* proposes to take action. In these circumstances, the consultation process serves to ensure that the actions the agency proposes will not jeopardize an endangered species, and it enables the Secretary to assess the potential impact of the action and, if necessary, to suggest "reasonable and prudent alternatives" that would not jeopardize the listed species and therefore not violate Section 7(a)(2). See § 7(b)(3), 16 U.S.C. 1536(b)(3). Here, the agency concerned — the Department of the Interior — has not proposed any "agency action" to modify the operation of Stampede Dam to provide for releases of water for M & I purposes, and the consultation requirement therefore has not been triggered. Moreover, even if private parties such as petitioners were authorized to trigger the consultation process simply by proposing to the agency concerned that it take "agency action," the only such proposal petitioners have suggested has already been found by the district court to be inadequate under Section 7(a)(2).

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

The purposes of the Act that are to be furthered by the Secretary are set forth in Section 2(b), 16 U.S.C. 1531(b):

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Section 2(c)(1) of the Act, 16 U.S.C. 1531(c)(1), reiterates these principles:

> It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

The three sections of the Act just quoted use the key terms "conserve" and "conservation," which in turn are defined in Section 3(3) of the Act, 16 U.S.C. 1532(3):

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

> which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Thus, it is clear that the concept of "conservation" under the Endangered Species Act goes beyond merely assuring that an endangered or threatened species does not become extinct. It contemplates affirmative "methods and procedures" in furtherance of the ultimate goal of bringing the species to the point at which the protections of the Act are no longer necessary — *i.e.*, to the point at which the species is no longer endangered or threatened. And Section 7(a)(1) expressly directs the Secretary to utilize "programs administered by him" — which includes the operation of Stampede Dam — in furtherance of this statutory purpose of "conservation." Indeed, Section 3(3) includes among an agency's "methods and procedures" for conservation that of "habitat * * * maintenance"; in his operation of Stampede Dam, the Secretary has sought to maintain a suitable habitat for the cui-ui and Lahontan cutthroat trout in the lower Truckee and at the mouth of the fishway during the spawning season. The plain language of the Act thus covers this very case. Accordingly, the court of appeals was clearly correct in holding (Pet. App. 8a) that the statutory provisions just cited support the Secretary's decision at this time to utilize water stored by Stampede Dam to conserve the fish and not to sell the water for M & I purposes that would detract from that effort.

b. Petitioners make no attempt to answer this analysis or to explain the significance of the various statutory provisions if they do not have the meaning we have just described. Petitioners simply ignore these provisions and discuss only the "no jeopardy" requirement of Section 7(a)(2). This approach, however, renders Section 7(a)(1) and the conservation obligation superfluous, a result that is not favored as a matter of statutory construction. See, *e.g.*, *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 402-403 (1975).

By contrast, the court of appeals' construction recognizes the comprehensive thrust of the Act and gives effect to all provisions of the Act. Under that construction, the "no jeopardy" requirement in Section 7(a)(2) establishes the nondiscretionary minimum obligation with which all federal agencies must comply. The distinct provision in Section 7(a)(1) for the Secretary to "review" other "programs administered by him" and to "utilize such programs in furtherance of the purposes of this chapter" is more flexible. It leaves to the sound discretion of the Secretary, after the review of a program in light of the Endangered Species Act, to determine the manner in which the statutory goal of conservation will be pursued in the context of the particular program. It does not, in our view, require the Secretary to ignore the other congressional purposes for which the program in question was adopted or to devote all resources made available for these other purposes to the single goal of species restoration. The matter is one of judgment, not absolutes.[8] There is no occasion here to consider the scope

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[8]For example, Section 2(c) declares it to be the policy of Congress that all federal agencies shall "seek" to conserve endangered and threatened species, and Sections 2(c) and 7(a)(1) both speak in terms of the utilization of agency programs "in furtherance" of the conservation purposes of the Act. This language does not suggest a requirement of slavish devotion to the immediate restoration of endangered species and abandonment of all else.

of that discretion. The courts below have sustained the manner in which the Secretary has exercised his discretion in implementing the Endangered Species Act in connection with Stampede Dam — by providing for releases of water to enhance the cui-ui and cutthroat trout — and petitioners do not contend that this discretion, if it exists, was abused. They simply argue that the Secretary had no such discretion.

Moreover, the court of appeals' holding that the Secretary is authorized by the Endangered Species Act to take affirmative measures to restore the cui-ui and cutthroat trout is strongly supported by this Court's decision in *TVA* v. *Hill, supra*. There, the Court stated that "[t]he plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." 437 U.S. at 184 (emphasis added). The Court's understanding of the 1973 Act in this regard was buttressed by numerous references to the legislative history,[9] and it was confirmed by the legislative history of 1978 and 1979 amendments to the Act that were enacted after the decision

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[9]See 437 U.S. at 179 (emphasis added) (a witness at the hearings recommended that "Congress require all land-managing agencies 'to avoid damaging critical habitat for endangered species and *to take positive steps to improve such habitat*' "); *id.* at 180 (quoting the definition of "conserve" in Section 3(3) as including steps to bring the species to the point where the protections of the Act are no longer required); *id.* at 182-183, quoting H.R. Rep. 93-412, 93d Cong., 1st Sess. 14 (1973) (emphasis supplied by the Court) (Section 7 "*requires* the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species"); *id.* at 187, quoting H.R. Rep. 93-412, *supra*, at 14 (emphasis added) (Section 7 authorizes the Director of the Park Service to protect grizzly bears in Yellowstone Park "until their members have *recovered* sufficiently to withstand those pressures").

in *TVA* v. *Hill*.[10] Petitioners' contention that the Endangered Species Act authorizes the Secretary to do no more in operating Stampede Dam than to refrain from jeopardizing the cui-ui and cutthroat trout thus is untenable.

c. Equally untenable is petitioners' extravagant assertion (Pet. 8) that by giving this interpretation to the Act, "[t]he Ninth Circuit in this case required the Secretary of the Interior to use all projects under his jurisdiction for the exclusive purpose of restoring the endangered and threatened species to their historical population levels." The court of appeals did nothing of the sort. Indeed, each phrase in petitioners' assertion is seriously flawed.

First, the court of appeals has not "required" the Secretary to do anything. It instead sustained the Secretary's own decision to conserve the fish and not to sell the Project's water for M & I purposes at this time (Pet. App. 8a). This case therefore presents no question of what obligations a court may impose on the Secretary to pursue the conservation purposes of the Act — over and above the minimum "no jeopardy" requirement — where he has chosen not to take affirmative measures to conserve an endangered or threatened species.[11]

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[10]See H.R. Rep. 95-1625, 95th Cong., 2d Sess. 10 (1978), paraphrasing *TVA* v. *Hill*, *supra* (the purpose of the Endangered Species Act is to "halt and reverse the trend toward species extinction — whatever the cost"); H.R. Rep. 95-1625, *supra*, at 5 (emphasis added) (the primary purpose of the Act is to prevent extinction "and to *return* the species to the point where they are viable components of their ecosystems"); H.R. Rep. 96-167, 96th Cong., 1st Sess. 3 (1979) (same).

[11]In the four appellate decisions cited by petitioners (Pet. 19 n.11), private plaintiffs challenged federal projects on the ground that the agency had not insured that the species would not be jeopardized and thus had not met even the minimum requirement under what is now Section 7(a)(2) of the Act. See *Roosevelt Campobello International Park Comm'n* v. *EPA*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607 (D.C. Cir. 1980); *Sierra Club* v.

Second, the court of appeals did not address the manner in which the Secretary may implement the Endangered Species Act with regard to "all projects under his jurisdiction." The court addressed only the particular circumstances of Stampede Dam. It did not suggest, for example, that the Secretary may take water away from the Newlands Reclamation Project and use it instead to increase the water available for the fish in Pyramid Lake. Two Terms ago, this Court held in *Nevada* v. *United States, supra*, that the project landowners have vested rights in this water that are protected under the doctrine of res judicata by virtue of the *Orr Ditch* decree. There has been no claim by the Secretary, much less a holding by the court of appeals, that he is authorized by the Endangered Species Act to override those project water rights and to devote Newslands Project water to the restoration of endangered species. Accordingly, petitioners' assertion that the decision below would "compel the unilateral abrogation of existing repayment contracts and privately owned water rights" (see Pet. 14) is frivolous.

Insofar as Stampede Dam is concerned, however, petitioner Carson-Truckee Water Conservancy District and the water users it might serve -- unlike the landowners and irrigation districts on the Newlands Project and other reclamation projects — have no existing repayment contracts or vested rights to the water stored by Stampede Dam. Petitioners' discussion of other reclamation projects (see Pet. 14-17) therefore has no relevance to this case. There is no indication how many of these projects do or will

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Froehlke, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976). None of these cases involved Section 7(a)(1) or the other provisions at issue here that refer to the conservation purposes of the Act; none involved challenges to affirmative measures initiated by the agency to benefit endangered or threatened species; and none suggested that an agency has no such authority.

have an effect on an endangered species; whether the circumstances of any such project would make it reasonable for the Secretary to conclude that some or all project water should be used to restore an endangered species[12]; and whether, on any such project, there are existing repayment or water right contracts that might have a bearing on his doing so.[13]

Even more far-fetched is petitioners' assertion that under the court of appeals' decision, "the Secretary of Transportation will be required to utilize federal highway funding solely for the restoration of listed species" (Pet. 17) and the Secretary of Defense "would have to convert the primary mission of the Air Force from national defense to the restoration of whooping cranes" (Pet. 16 n.8). Neither the

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[12]The Narrows Unit Project, discussed by petitioners (Pet. 15-16), involves a situation in which the Secretary did not determine that all of the water from the project should be used to enhance the status of the particular endangered species, the whooping crane. As petitioners explain, the Fish and Wildlife Service there proposed reasonable and prudent alternatives to operate the project in a way that would not jeopardize the species. No such alternatives have been proposed here. Moreover, there is no indication that the whooping crane would significantly benefit, as do the fish in Pyramid Lake, from the total water resources of the project, such that it might be appropriate to devote more or all project water to "restoring" the crane. This example thus reinforces our submission that whether and to what extent a particular species can be "conserved" by utilizing a project administered by an agency — and the degree to which that project should be committed to that purpose — are matters within the discretion of the Secretary, at least in the first instance. Nothing in the court of appeals' opinion limits the Secretary's discretion in this regard by compelling that all water on all projects be devoted to species conservation.

[13]For similar reasons, there is no basis for petitioners' broad assertion (Pet. 14) that the decision of the court of appeals will "prevent finalization" of the 93 repayment contracts that were the subject of negotiations between the Bureau of Reclamation and water users during the July-September quarter. When and if Endangered Species Act problems arise, they must be resolved on a case-by-case basis. See 16 U.S.C. 1536(b) and (c). The court of appeals suggested no absolute rules.

Secretary of Transportation nor the Secretary of Defense has proposed such an outlandish undertaking, and no court would sustain it. Moreover, it is difficult to conceive, except in the most peculiar of circumstances, how the construction of highways or target bombing could be "utilized" affirmatively to restore endangered or threatened species. In the context of highway construction and defense maneuvers, the principal impact of the Endangered Species Act is to prevent the location of a road or military installation from jeopardizing a listed species. A dam, by contrast, obviously lends itself more readily to utilization to conserve an endangered species of fish.

Third, the court of appeals did not suggest that agencies generally are to devote projects that have other purposes to the "exclusive purpose" of restoring endangered and threatened species. Nor is that even the result of the Secretary's determination, sustained by the courts below, with regard to Stampede Dam. The Secretary of the Interior directed that construction of Stampede begin in 1966, without repayment contracts providing for the release of water for reimbursable beneficial uses, because he concluded that the project was justified at that time by its flood control benefits alone (Pet. App. 26a). The project of course continues to provide flood control, which is one of its express purposes under the Washoe Project Act. 43 U.S.C. (1970 ed.) 614. Indeed, "development of fish and wildlife resources" also is one of the express purposes of the Washoe Project. *Ibid.* As a result, the release of water in a manner that promotes the spawning of the cui-ui and Lahontan cutthroat trout in Pyramid Lake has the effect in this case of *furthering* a purpose of the Project itself, not of devoting the Project exclusively to a purpose that is wholly foreign to its authorizing statute, as petitioners argue.

Fourth, contrary to petitioners' repeated characterization (Pet. 8, 9, 18), the court of appeals' opinion says nothing about restoring species to their "historical population levels" (Pet. 8). The definition of the term "conserve," on which the court of appeals relied (Pet. App. 6a-8a), refers to methods and procedures necessary to bring the species "to the point at which the measures provided pursuant to this chapter are no longer necessary" (§ 3(3), 16 U.S.C. 1532(3)) — *i.e.*, the point at which they are no longer endangered or threatened. That presumably could be well below the "historical population levels" of the fish.

3. Petitioners' related argument (Pet. 10, 13, 20) that the Secretary is precluded from taking measures to enhance the fish in Pyramid Lake because to do so would conflict with the purposes of the Washoe Project Act also is without merit. As an initial matter, the fact that furthering the purposes of the Endangered Species Act (by restoring an endangered species) might require that the purposes of the particular project be displaced to some extent is not in itself an absolute barrier to an agency's taking such measures. Section 7(a)(1) directs the Secretary to "review" other programs administered by him, thereby making clear that the implementation of previously authorized projects was to be reassessed in light of the subsequent passage of the Endangered Species Act. Section 7(a)(1) then further directs the Secretary to "utilize such programs" to further the purposes of the Act. Thus, the effect of Section 7(a)(1) is to provide that the purposes of the Endangered Species Act of conserving listed species now are also additional purposes of the particular program involved — at least where this species enhancement goal is germane to the particular project, as it plainly is in the context of Stampede Dam. This Court stressed this very point in *TVA* v. *Hill*, *supra*, when it observed that "[t]he pointed omission of the type of qualifying language previously included in endangered species

legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185. See generally *id.* at 181-185.

Moreover, whatever the force of petitioners' "conflict" argument in other settings, it has no merit whatever in this case. As we already have explained, the "development of fish and wildlife resources" is one of the express purposes of the Washoe Project Act. 43 U.S.C. (1970 ed.) 614. By contrast, M & I consumption, which petitioners seek to promote, is not even mentioned in the Act. Moreover, the House Report on the Washoe Project Act states that "[r]estoration of the Pyramid Lake trout fishery to its full potential value is deemed to be of national interest and importance, because, among other things, of the adverse results of previous Federal participation in the development of the waters affecting the fishery of the lake." H.R. Rep. 2055, *supra*, at 5. Against this background, the release of water for restoration of the fishery in Pyramid Lake plainly does not conflict with the purposes of the Washoe Project Act.

To be sure, when the Washoe Project Act was passed, Congress focused on the fishery primarily by providing for facilities to increase minimum storage in Lake Tahoe and the Marble Bluff Dam and other facilities on the lower-Truckee. 43 U.S.C. (1970 ed.) 614c. But circumstances have changed since then. Significantly, for example, irrigation and drainage of thousands of acres were expected to be among the principal uses of project water; in fact, aside from generation of hydroelectric power (which of course will still take place), irrigation and drainage were the only reimbursable purposes to which the project was to be put. But as the court of appeals pointed out, that "is no longer a viable use of the project" (Pet. App. 4a). The question confronting the Secretary at the present time then, is what use should be made of water stored by Stampede Dam in

these changed circumstances. Especially in light of the intervening passage of the Endangered Species Act and the importance Congress placed on restoring the Pyramid Lake fishery when it passed the Washoe Project Act, it surely is not an abuse of discretion for the Secretary to release project water to develop the fish resource rather than to sell the water for M & I consumption at this time.

Petitioners seek to avoid this result by characterizing the primary purpose of the Washoe Project Act as obtaining reimbursement for the cost of its construction, and argue that the Secretary's release of water for the fishery instead of selling it for M & I use conflicts with that purpose. This argument is without merit. The "purposes" of the Washoe Project Act are expressly listed in 43 U.S.C. (1970 ed.) 614: irrigation, drainage, flood control, hydroelectric power, development of fish and wildlife resources, and other beneficial purposes. Obtaining reimbursement is not listed as a separate "purpose," much less the overriding one that petitioners maintain it is. Rather, reimbursement is the *consequence* of using project water to fulfill certain of the listed purposes, two of which (irrigation and drainage) are no longer viable. We do not mean to denigrate the importance to the Federal Treasury of obtaining reimbursement or to doubt the role of the reimbursement principle in the history of the reclamation program. But that feature of the reclamation program was intended principally for the benefit of the government, not to confer rights on private parties who might make the reimbursements, such as petitioner Carson-Truckee Water Conservancy District or the water users it might serve. Moreover, Congress anticipated that furthering the purposes of the Endangered Species Act would often entail substantial costs (see *TVA* v. *Hill*, 437 U.S. at 184) — here, in the form of reimbursements delayed or foregone. That consequence alone is not a basis for concluding

that the Secretary may not further those purposes in the operation of Stampede Dam.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

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[14]Contrary to petitioners' contention (Pet. 20-24), the court of appeals did not hold that the Secretary has no obligation to seek reimbursement for the construction and operation costs of Stampede Dam. It expressly vacated the district court's judgment on that issue and reserved a ruling on it. See Pet. App. 4a-5a, 10a. In footnote 5 of its opinion (*id.* at 8a n.5), upon which petitioners apparently rely (Pet. 21 n.13), the court of appeals indicated only that the Secretary has no *present* obligation to sell water for M & I use that overrides his authority under the Endangered Species Act to release water for fishery conservation purposes. Petitioners' argument (Pet. 20-24) about the role of reimbursement in the reclamation program therefore has no relevance to this case. Nor does the Secretary have any intention of abandoning the reimbursement principle in his administration of the reclamation program generally or of Stampede Dam in particular.

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No. 84-808

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT and
SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
POINTS IN REPLY	1
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

Cases

Berkemer v. *McCarty*, 104 S.Ct. 3138 (1984)	10
Carson-Truckee Water Conservancy District v. *Clark*, 748 F.2d 523 (9th Cir. 1984)	4
Carson-Truckee Water Conservancy District v. *Clark*, 741 F.2d 257 (9th Cir. 1984)	8
Carson-Truckee Water Conservancy District v. *Watt*, 537 F.Supp. 106 (D. Nev. 1982)	10
TVA v. *Hill*, 437 U.S. 153 (1978)	3, 5

Statutes

Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*	*passim*
Washoe Project Act, 43 U.S.C. §§ 614-614d	*passim*

Miscellaneous

H.R. Rep. No. 567, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807	7

PETITIONERS' REPLY BRIEF

POINTS IN REPLY

Despite respondents' attempts to obscure the true impact of the lower courts' holdings, this case presents legal questions of national importance, as evidenced by the fact that 11 States and two major groups representing a large number of water users have filed briefs in support of petitioners' request for a writ of certiorari.

The Pyramid Lake Paiute Tribe of Indians (the "Tribe") and the Secretary of the Interior (the "Secretary") have both filed briefs opposing review of the Ninth Circuit's decision in this case. Petitioners make the following points in reply.

1. Respondents repeatedly assert that the courts below did no more than approve the Secretary's use of his "discretion." [1] The Secretary even states that the Endangered Species Act ("ESA") does not require "slavish devotion" to the immediate restoration of threatened or endangered species (Sec. Br. 15 n.8), and that the Court of Appeals "has not 'required' the Secretary to do anything" (*id.* at 17). But other parts of the Secretary's brief belie these assertions. Thus, he concedes that the ESA "expressly directs" the Secretary to utilize his programs to "conserve" (*i.e.*, to bring the species to a point where they are no longer listed), states that the ESA requires "affirmative" measures, methods and procedures to reach that goal, and cites to the Act's legislative history for the proposition that Congress "require[d]" the Secretary "to take positive steps" in this direction.[2]

Even more importantly, two separate events—wholly ignored by respondents in their briefs—demonstrate that

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[1] Tribe Br. 13; Sec. Br. 10. "Tribe Br." and "Sec. Br." refer to the separate briefs in opposition filed by the Tribe and the Secretary in this case.

[2] Sec. Br. 14 & 16 n.9.

the courts below did not merely approve a discretionary act but instead mandated the use of water until endangered and threatened species are wholly restored. These events also demonstrate that both the Secretary and the Tribe have taken positions contrary to those they assert in their opposition briefs:

(a) Recognizing that the District Court had entered an order which stripped the Secretary of his discretionary authority,[3] the Secretary moved the court to amend its judgment. Pet. App. 57a. He was concerned that the District Court allowed him no discretion to suggest reasonable and prudent alternatives that would fulfill the objectives of the Washoe Project Act without violating the ESA. *Id.* at 60a. In fact, he specifically stated in his motion: "The Secretary is concerned that the judgment as it now reads, *ordering* him to utilize the waters of Stampede Reservoir for this fishery until the fish are no longer classified, might prevent the adoption of such reasonable and prudent alternatives." Pet. App. at 60a-61a; emphasis added.

The District Court misunderstood the thrust of the motion and viewed it as addressing only the Secretary's discretion in determining the *amount* of water necessary to restore the fish. Pet. App. 62a. The court therefore denied the motion on the ground that nothing in the court's judgment directed the Secretary "to release more Stampede water than is necessary to assure the recovery of the endangered and threatened species of Pyramid Lake." *Id.* Instead of allowing the Secretary the re-

[3] The District Court's judgment states, in part:

> The Secretary of the Interior is ordered to utilize the water stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout. [Pet. App. 55a.]

quested discretion, the District Court thereby made doubly clear that it was mandating the use of whatever water was necessary to restore the species. In direct contradiction to the position he asserts here, the Secretary thus acknowledged below that the District Court's judgment (affirmed by the Court of Appeals) was mandatory and left no room for discretion on his part.

(b) The Fish and Wildlife Service has taken the position not only that the District Court mandated a duty on the part of the Secretary but that the judgment below was wrong.

The Service's Director, acting pursuant to a memorandum from an Associate Solicitor, wrote his Regional Directors that he in effect was disavowing the District Court's opinion in this very case (see his letter and accompanying memorandum attached as an Appendix hereto). The accompanying memorandum stated, *inter alia*:

> In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under ESA than those originally intended by Congress. [App. 3a.]
>
> * * * *
>
> [The District Court] inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority* v. *Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). * * * It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time as the cui-ui and Lahontan cutthroat trout are recovered. [App. 8a-9a; emphasis in the original.]
>
> * * * *
>
> Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. More-

> over, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy. [App. 9a; footnote deleted.]
>
> * * * *
>
> Thus, it would now be unacceptable [under the District Court's opinion] for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes. [App. 10a.]
>
> * * * *
>
> The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. [App. 11a.]

Thus, the attempts by respondents before this Court to portray the decisions below as nothing more than approvals of the Secretary's discretion are disingenuous at best. And whether the Fish and Wildlife Service is or is not correct in its interpretation of the Act, its conclusions clearly show that there is conflict within the Department of the Interior itself over the proper interpretation of the ESA—a conflict that requires resolution by this Court.

2. The Tribe also contends that this case involves nothing more than a factual finding. Tribe Br. 17. But this position is directly contrary to the position the Tribe has asserted before this Court in a Petition for Writ of Certiorari in this same case relating to a denial of attorneys' fees.[4] The Tribe there told the Court that the dispute in

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[4] Petition for Writ of Certiorari, *Carson-Truckee Water Conservancy District* v. *Clark*, 748 F.2d 523 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. —— (U.S. Feb. 26, 1985) (No. 84-1384) (hereinafter "Tribe Pet.").

this case centers on "whether the ESA required the Secretary to operate Stampede Reservoir under a 'jeopardy' or a 'conservation' standard." Tribe Pet. 5. And this, said the Tribe, was a "legal question." *Id.* The Tribe's characterization of this case in its attorneys' fees petition is thus directly contradictory to the position it takes on the merits here.

3. Respondents argue that this case is on all fours with *TVA* v. *Hill*, 437 U.S. 153 (1978), in which this Court ruled that the ESA prevails wherever a proposed action would destroy an endangered species.

Neither the Ninth Circuit nor the District Court, however, relied on *TVA*'s "irreconcilable conflict" doctrine to deny petitioners' access to water suplies.[5] Significantly, neither court *could* have invoked the doctrine because federal authorities had not adhered to the ESA's procedural requirements and analyzed a range of alternative water-use scenarios to determine whether or not *all* proposed use patterns would involve an "irreconcilable conflict" with the livelihood of the cui-ui or Lahontan cutthroat trout.[6]

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[5] To illustrate, the Ninth Circuit's opinion mentions the *TVA* case only once in its opinion, and it does not cite the case in connection with the proposition that an "irreconcilable conflict" is involved in this case. Pet. App. 7a. Likewise, in the District Court's October 4, 1982, opinion which adjudicated issues arising under the ESA, the court did not rely on *TVA*'s "irreconcilable conflict" theory. Instead, it cited the *TVA* case to support its expansive views of the Secretary's duties under the ESA. Pet. App. 45a.

[6] As this Court emphasized in *TVA*, the *sine qua non* of an "irreconcilable conflict" determination is a conclusion that no action can be taken without destroying the habitat of an endangered species. 437 U.S. at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat"). Before such a definitive conclusion can be reached, the Act requires the Fish and Wildlife Service to initiate consultation, prepare a biological opinion, and analyze all possible alternatives. ESA §§ 7(a)(3)

Moreover, the Secretary conceded below that this case did not involve an irreconcilable conflict between the Washoe Project Act and the ESA. Petitioners asked *that very question* of the Secretary in their interrogatories during the trial stage of this case:

> *Int. No. 23.* Do the federal defendants contend that 16 U.S.C. § 1536 [Section 7] prevents them from utilizing (within the meaning of said section) Stampede Dam to provide municipal and industrial water?
>
> *Answer to Int. No. 23.* The Federal Defendants do not so contend. [Trial Exhibit No. 226.]

The courts below questioned the feasibility of one plan that allegedly would have reduced flows during critical periods, but the Fish and Wildlife Service's failure to complete Section 7's consultation requirements and prepare a biological opinion and analysis of alternatives left the courts unable to make an "irreconcilable conflict" determination. The District Court found petitioners' proposed plan unacceptable under the ESA because it "would jeopardize the fish." Pet. App. 9a. Respondents have attempted to bootstrap this limited conclusion into a broad-based factual finding that *any* plan for with-

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and 7(b). Remarkably, *none* of these procedural requirements was satisfied in this case. The failure to follow the ESA's obligations not only violated the statute, but it deprived the courts below of the factual record necessary to conclude that use of water from the Stampede Reservoir under any and all circumstances would pose an "irreconcilable conflict" with fish in the Reservoir. To illustrate, when the Service completed a limited consultation in connection with a short-term request for water use for municipal and industrial purposes, the Service concluded that water withdrawals would be possible so long as the Service could "vary its request for water and realize releases that will maximize the spawning effort of both listed species." Exhibit A at 2, Trial Document No. 413 (July 20, 1982). Thus, it is apparent that if the Service had completed a full consultation and evaluation of alternatives, as required by the ESA, no "irreconcilable conflict" would have been found.

drawing *any* amount of water would jeopardize the fish and be unlawful under the ESA. Precisely because the ESA's procedural obligations were ignored in this case, the courts below were in no position to make such a finding, and they did not do so.

4. Respondents cannot brush aside the ESA's consultation requirements on the theory that " 'the Secretary has not undertaken a project that threatens an endangered species' " (Tribe Br. 18-19) or that petitioners have not submitted a proposal that would bring the consultation requirements into play (Sec. Br. 11-12). Section 7's procedural requirements are designed to insure that the Secretary has an opportunity to evaluate a request for a federal action *before* it has been undertaken. *See, e.g.*, ESA § 7(a)(3) ("a Federal agency shall consult with the Secretary *on any prospective agency action* at the request of * * * the prospective permit or license applicant * * *.") (emphasis added.)[7] Indeed, in the cases cited by the Tribe, consultation was undertaken and completed before a federal project was undertaken. *See* Tribe Br. 19-20.

As for the argument that petitioners have failed to submit a proposal that would trigger the consultation provisions, the Secretary has again turned the Act around. Under the clear language of the ESA, it is the Secretary who has the mandatory obligation to propose and evaluate alternative actions. As Section 7(b)(3)(a) of the statute provides, "the Secretary *shall suggest* those reasonable and prudent alternatives" which would not jeopardize the existence of an endangered or threatened species and which "can be taken by the Federal agency or applicant in implementing the agency action" (emphasis added). By failing to comply with this statutory directive, the Secretary violated a key procedural safe-

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[7] *See also* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810; H.R. Rep. No. 567, 97th Cong., 2d Sess. 14, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2814.

guard included in the ESA and ignored his obligation to accommodate the utilization of resources with the needs of endangered and threatened species.[8]

As a result of its complete failure to focus on the ESA's procedural requirements, the Ninth Circuit no longer requires that the Secretary evaluate proposed actions and their alternatives under Sections 7(a)(2) and 7(a)(3) to determine whether or not they will "jeopardize the continued existence" of an endangered or threatened species. Instead, the Secretary must reject any proposed action that will not actively assist in the recovery of an endangered species—regardless of whether the action will jeopardize the continued existence of the species. *See* Pet. App. 7a-8a.[9] This approach reads Sec-

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[8] In an attempt to excuse the lower courts' failure to adhere to the ESA's procedural requirements, the Tribe asserts that "before the district court the petitioners specifically rejected any notion that the Secretary should conduct a § 7(a)(3) consultation, preferring instead to rely on their own plan for the operation of Stampede." Tribe Br. 11. The record shows otherwise. Petitioners repeatedly argued below that the Secretary has a duty to consult with the Fish and Wildlife Service to determine ways in which Stampede can be operated for its congressionally mandated purposes without jeopardizing the continued existence of the cu-ui and Lahontan trout. *See, e.g.*, Post Trial Brief (Part II) of Plaintiffs Carson-Truckee Water Conservancy District and Sierra Pacific Power Company 21-22, 25 (April 19, 1982); Memorandum in Support of Plaintiff's Motion For New Trial Or, In the Alternative, For Amendment and Modification of Findings, Conclusions and Judgment 2-3, 12-13, 21-22, and 24-25 (Nov. 8, 1982); Opening Brief for Appellants Carson-Truckee Water Conservancy District and Sierra Pacific Power Company at 2-3 and 30-34, *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984); Reply Brief of Appellants Carson-Truckee Water Conservancy District and Sierra Pacific Power Company at 4-5, *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984).

[9] In accordance with this unprecedented interpretation of the ESA, the Ninth Circuit affirmed a District Court order that *requires* the Secretary to withhold *all* water in the Stampede Reser-

tion 7's procedural requirements and substantive standard out of the Act, replacing them with a vague "affirmative duty" standard. As pointed out by *amici*, the new statutory standard is such a radical departure from the language of the Act and prior agency interpretations of the statute that it even conflicts with the regulations the Secretary of the Interior has promulgated under the Act.[10]

5. The Secretary concedes that when the Washoe Project Act was passed, Congress focused on the fishery and provided *other facilities* to make sure that the fishery was maintained. Sec. Br. 21. But, argues, the Secretary, "circumstances have changed since then." *Id.* at 21-22. Nowhere does the Secretary explain why changed circumstances should alter the Secretary's duties unless the circumstances have been brought to the Congress's attention and Congress has agreed that the Secretary's duties should change by raising the $2 million spending limit imposed by the Washoe Project Act on fish and wildlife expenditures.

6. The Secretary argues that the courts below do not require him to restore endangered or threatened species to "historical levels." Sec. Br. 21. Instead, he asserts —without any support—that a species "presumably" could be removed from the list of endangered or threatened species even though it has not recovered to historical levels. *Id.* By asserting that his obligation to "restore" endangered and threatened species may involve something less than a return to historical levels, the Secretary has underscored the ambiguity inherent in the lower courts' reading of the ESA. Although the

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voir until the cui-ui and Lahontan cutthroat trout no longer qualify as endangered or threatened species. *See* n.3, *supra*.

[10] *See* Brief *Amici Curiae* of the National Water Resources Association and the Association of California Water Agencies at 7-8.

courts below mandated that the Secretary must take affirmative steps to restore, the Secretary has admitted that even he cannot identify when this duty will be discharged.

7. As alternative grounds for supporting the result obtained below, the Tribe attacks the District Court's decision in *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982) ("Carson-Truckee I") (Pet. App. 23a). None of the factors recognized by the Court in *Berkemer* v. *McCarty*, 104 S. Ct. 3138, 3148-49 n.23 (1984), is present in this case that would support consideration of these questions without the filing of a cross-petition.[11] Moreover, nothing in the Ninth Circuit's opinion casts doubt on its affirmance of the relevant portions of *Carson-Truckee I*, and the principles of standing and private rights of action there upheld are well settled. Therefore, the Court should refuse to reach the Tribe's alternative grounds.

CONCLUSION

As the briefs for petitioners, 11 Western States, the National Water Resources Association, and other *amici* demonstrate, this case presents legal issues of great national importance. Accordingly, petitioners respectfully renew their request that the Court grant certiorari and reverse the Ninth Circuit's ruling.

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[11] Despite having requested and received an extension of time for the purpose of filing a cross-petition for certiorari, the Tribe has chosen instead to urge these grounds upon the Court in its Brief In Opposition.

Respectfully submitted,

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APPENDIX

APPENDIX

(SEAL)

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

[October 5, 1983]

In Reply Refer To:
FWS/OES

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7 (ARD/FA or ARD/AFF) Acting Associate

From: Director

Subject: Solicitor's Opinion Regarding Endangered Species Act (ESA) Conservation Obligations of Federal Agencies

Attached, please find the above-mentioned Solicitor's (SOL) opinion (dated September 7, 1983). In it, SOL rejects the district court's conclusion that (Section 7(a)(1) of the ESA) can mandate a *particular* conservation program for a listed species at the expense of other project objectives. In other words, SOL feels Federal agencies have the authority to integrate endangered species conservation into project planning but are not required to do so in any particular manner. The only mandatory requirement placed on Federal agencies is to insure that their actions are not likely to jeopardize listed species (Section 7(a)(2) of the ESA). Thus, Biological Opinions should not include statements saying that unless a given agency adopts a particular conservation recommendation, it will be "in violation of its Section 7(a)(1) responsibilities."

The district court's decision is not precedent setting and should be applied only to the Stampede Reservoir case.

/s/ Roman H. Koenings

Attachment

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D.C. 20240

(September 7, 1983)

Memorandum

To: Director, United States Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Endangered Species Act conservation obligations of Federal agencies

We have recently reviewed the district court opinion in *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704 (D. Nev. 1982), *appeal filed* No. 83-1549 (9th Cir., Jan. 3, 1983), which discussed the conservation obligations of Federal agencies under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531 *et seq.* In the *Carson* case, the plaintiffs sought to force the Bureau of Reclamation to store additional water in the Stampede Reservoir for municipal and industrial use. Ultimate diversion of the stored water for such uses would reduce the flow of water into Pyramid Lake, the habitat for two fish which are listed under the ESA. The plaintiffs had contended that the ESA did not prevent the Secretary from operating Stampede Reservoir for municipal and industrial uses as long as that operation would not jeopardize the continued existence of the cui-ui fish and the Lahontan cutthroat trout. In response to this contention, defendants argued that the Secretary had an affirmative obligation under the ESA to *conserve* those two fish above and beyond the substantive prohibition found in Section 7(a)(2) against jeopardizing their continued existence. The defendants thus cited this higher conservation responsibility as authority for operating Stampede Reservoir so as to aid in the recovery

of the cui-ui and the Lahontan cutthroat trout. In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under the ESA than those originally intended by Congress. Our analysis follows.

Statutory Framework

Five subsections of the ESA are relevant for purposes of analyzing the district court's decision in the *Carson* case. First, subsection 2(c)(1) of the ESA sets forth the general hortatory policy that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c).

Second, subsection 3(3) of the Act, 16 U.S.C. § 1532(3), states in part:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. . . .

A third relevant part of the ESA is subsection 5(a), 16 U.S.C. § 1534(a), which expressly confers upon the Secretary of the Interior the responsibility for implementing "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title." This subsection has generally been considered to be the true source of the Secretary's affirmative conservation responsibilities under the ESA.

The two remaining relevant parts of the Act are subsections 7(a)(1) and 7(a)(2).[1] Subsection 7(a)(1), 16

[1] Before the enactment of the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, the "conserva-

U.S.C. § 1536(a)(1), restates the general hortatory language in subsection 2(c)(1) quoted above and constitutes an affirmative grant of authority to Federal agencies to aid in the conservation and recovery of listed species through existing agency programs:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

Subsection 7(a)(2), 16 U.S.C. § 1536(a)(2), on the other hand, sets out the Act's major substantive limitation on the exercise of Federal agency discretion by requiring that each agency shall:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been

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tion" and "jeopardize" standards of section 7 were combined in one lengthy sentence. The 1978 Amendments added an exemption process and divided the "conservation" and "jeopardize" provisions into separate sentences within subsection 7(a). Finally, the Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1241, separated the "conservation" and "jeopardize" standards into subsections 7(a)(1) and 7(a)(2), respectively.

> granted an exemption for such action by the Committee pursuant to subsection (h) of this action [*sic*; read "section" in ESA]. . . .[2]

Analysis

Although the above subsections of the ESA constitute the relevant legal framework for addressing the issues raised in the *Carson* case, the district court only relied upon subsections 2(c)(1), 3(3) and 7(a)(2) in issuing its opinion. After a cursory recital of the provisions of the first two of those subsections, the district court cited the Supreme Court decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) as standing for the proposition that the ESA "gives endangered species the highest priority over all federal projects." *Carson, supra*, 549 F. Supp. at 709. The district court then went on to cite and adopt the holdings of two migratory bird hunting regulation cases involving endangered species, *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978).[3] Relying upon the above cases, the district court in the *Carson* case concluded that

> . . . the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened. *Carson, supra*, 549 F. Supp. at 710.

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[2] Subsection 7(a)(2) thus contains two substantive prohibitions: federal agencies shall not "jeopardize" the continued existence of a listed species or adversely modify its critical habitat. For purposes of this memorandum, any refernece to the "jeopardy" prohibition under subsection 7(a)(2) should be understood to also include the prohibition against adversely modifying critical habitat.

[3] Those cases addressed the relationship between the Endangered Species Act, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.

We disagree with this conclusion for a number of reasons. To begin with, no one disputes that the Secretary has express conservation responsibilities under the ESA. We have identified these responsibilities as arising specifically from subsection 5(a), and more generally from subsections 2(c)(1) and 7(a)(1), of the Act. Within the Department of the Interior, the agency that has been delegated the Secretary's affirmative conservation responsibilities under subsection 5(a) of the Act is the United States Fish and Wildlife Service. 242 D.M. 1.1A.

Coincidentally, it was also the Fish and Wildlife Service that was the defendant in the *Defenders of Wildlife* and *Connor* cases (relied upon by the district court in *Carson*). The Service was admonished in those two cases for only focusing on avoiding the "jeopardy" of listed species under its migratory bird hunting program. However, those cases did not ultimately turn on the Service's compliance with its conservation responsibilities under the ESA. Rather, they turned on the more narrow grounds of whether the Service had established an adequate administrative record regarding endangered species and migratory bird hunting so as to rebut the charge that the agency's hunting regulations were arbitrary and without a rational basis under the Administrative Procedure Act. In both cases, the Service's regulations were found to be arbitrary, albeit for entirely different reasons. Thus, instead of being viewed as authority for establishing a sweeping new set of stringent endangered species priorities, the *Defenders of Wildlife* and *Connor* cases should be read as fairly narrow cases under the Administrative Procedure Act which do no more than remind agencies of the need to clearly articulate the factual basis for their regulatory actions.

In addition to putting an inappropriate gloss on the *Defenders of Wildlife* and *Connor* cases, the district court in *Carson* also confused the set of priorities created by Congress under subsections 7(a)(1) and 7(a)(2). No

one can dispute after *Tennessee Valley Authority v. Hill* that Congress established endangered species conservation as the highest priority under the latter subsection of the Act. When a proposed project is found likely to jeopardize the continued existence of a listed species, the project must either be exempted under the complicated procedure set forth in subsections 7(e) through (n) of the Act or be modified or abandoned altogether.

Moreover, as shown by the complex amendments to section 7 enacted in 1978, 1979, and 1982, it has been subsection 7(a)(2), with its rigid set of priorities and procedures, that has generated the most Congressional scrutiny and review.[4] It is significant to note, however, that this lengthy Congressional debate regarding section 7 has been marked by conspicuous silence over the substantive impacts, if any, of subsection 7(a)(1), and with valid reason. For while subsection 7(a)(1) could be characterized as a general grant of authority to integrate endangered species conservation into other existing federal programs, that subsection did not, as did subsection 7(a)(2), establish any rigid set of priorities among competing, often conflicting, program objectives. That is, while subsection 7(a)(1) added endangered species conservation to the potential list of generic program goals and authorities for a given project, it did not require that such conservation initiatives be factored in first. Subsection 7(a)(1) had a more limited purpose: it resolved once and for all the question as to whether federal agencies had the authority to add endangered species conservation into their planning processes. No longer could

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[4] See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 25-28 (1982); S. Rep. No. 418, 97th Cong., 2d Sess. 16-22 (1982); H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11, 13-15, 24-29 (1982); H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12-16 (1979); S. Rep. No. 151, 96th Cong., 1st Sess. 3-4, 4-6 (1979); H.R. Rep. No. 167, 96th Cong., 1st Sess. 5-6 (1979); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18-23 (1978); S. Rep. No. 874, 95th Cong., 2d Sess. 2-7 (1978); H.R. Rep. No. 1625, 95th Cong., 2d Sess., 7-13, 14-15, 19-25 (1978).

agencies argue that they lacked the authority to accomplish that objective. While giving federal agencies this grant of discretionary planning authority, however, Congress did not dictate a particular set of results. It did not mandate that endangered species conservation be accorded the highest priority in all planning efforts.

This difference in approach between subsection 7(a)(1) and 7(a)(2) has a ready explanation. Subsection 7(a)(1) provides federal agencies with the authority to "do good things" for endangered species; *i.e.*, to aid in their recovery through compatible agency programs. Subsection 7(a)(2), on the other hand, focuses on the potential for *conflict* between a given agency program and endangered species conservation. In such conflict situations where the continued existence of a listed species may be at stake, Congress has made the value judgment that endangered species conservation comes first. Any lesser choice could result in extinction, as recognized by the Supreme Court in *Tennessee Valley Authority v. Hill*, *supra*, 437 U.S. at 184-85.

The district court erred in the *Carson* case, by failing to recognize this difference in focus between subsections 7(a)(1) and 7(a)(2). It inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority v. Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). As to whether the Secretary had the discretionary authority under the ESA to integrate endangered species conservation into the operation of Stampede Reservoir, there can be no doubt. Subsection 7(a)(1) clearly provides that authority and the district court's opinion should have stopped with that conclusion. It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time

as the cui-ui fish and the Lahontan cutthroat trout are recovered.

This ordering of priorities is not only inconsistent with general Congressional intent for subsection 7(a)(1), it also produces the anomalous result of according greater substantive weight and impact to subsection 7(a)(1) than to subsection 7(a)(2).[5] Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. Moreover, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects a listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy.[6]

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[5] Although there is no express legislative history directly weighing and comparing the relative strengths of subsection 7(a)(1) with 7(a)(2), there can be no doubt that Congress considered the jeopardy standard of subsection 7(a)(2) as being the substantive cornerstone of section 7:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of section 7(a) of the act is that Federal agencies insure their actions do not jeopardize the continued existence of an endangered or threatened species.

S. Rep. No. 151, *supra* note 4, at 4 (emphasis added).

[6] The current section 7 regulatory definition of jeopardy recognizes that a given project can incidentally take a number of endangered species and still not violate the jeopardy standard. 50 C.F.R. § 402.02. The level of incidental take allowable under subsection 7(a)(2) varies, depending on the relative scarcity of the particular species involved. Congress implicitly ratified this regulatory construction in 1982 by providing in subsections 7(b)(4) and (o) of the Act that incidental takings which occur for a project that received a "no jeopardy" biological opinion, would not constitute a violation of the taking prohibitions of section 9. However, if subsection 7(a)(1)'s affirmative conservation provisions were the true substantive yardstick upon which federal programs were to be measured, Congressional amendments in subsections 7(b)(4) and (o) would have been pointless, since it is difficult to conceive of a

If one followed the logic of the *Carson* case, however, one would now have to assume that this long standing administrative interpretation of the Act was wrong. It would no longer be enough to show that a proposed action would not jeopardize the continued existence of a listed species. Henceforth you would have to show that a given project was contributing to the conservation of affected listed species and would continue to do so until the species were recovered. Thus, it would now be unacceptable for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes.

This simply is not what Congress could have intended, for the resultant impacts would be so extreme and devastating to Federal agency programs that Congress would have unquestionably addressed the matter in the 1978, 1979 and 1982 amendments to the Act. What they addressed instead was the need to provide an exemption to the only substantive standard that they perceived to exist in section 7, the jeopardy standard in subsection 7(a)(2). Throughout the exemption process provisions of the Act, it is a conflict with subsection 7(a)(2) and not subsection 7(a)(1) that is a prerequisite to seeking an exemption. *See* 16 U.S.C. § 1536(f), (g)(1) and (3), (h). Yet the *Carson* ruling puts a gloss on subsection 7(a)(1) that makes it more burdensome than subsection 7(a)(2). Would Congress have spent so must [*sic*] time on subsection 7(a)(2) if subsection 7(a)(1) were even more restrictive? We think that the obvious answer to that question is "no."

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situation where any level of incidental take could satisfy the affirmative conservation standards decreed by the district court in *Carson*. Thus, it is clear that subsection 7(a)(2) contains the only substantive mandate controlling agency action under section 7.

Conclusion

For the reasons stated above, we conclude that the interpretations placed upon the Secretary's conservation responsibilities in the *Carson* case are in error and beyond the intent of Congress. In addition to overlooking the truly relevant subsections of the ESA, the district court misplaced its reliance upon the *Defenders of Wildlife* and *Connor* cases. Those cases should be viewed as fairly narrow cases under the Administrative Procedure Act and nothing more. Moreover, *Tennessee Valley Authority v. Hill* is of questionable relevance, since that case concerned a violation of the substantive prohibition of section 7 (the jeopardy standard) and did not involve the grant of affirmative conservation authority in subsection 7(a)(1). While a Congressionally-mandated set of priorities was established under subsection 7(a)(2) of the Act, no such ordering of project purposes and priorities was established under subsection 7(a)(1). Federal agencies are now empowered to incorporate endangered species concerns into project planning, but so long as the jeopardy standard of subsection 7(a)(2) is not violated, no *particular* conservation goal or priority is required under subsection 7(a)(1).

In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that. As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

/s/ Keith E. Eastin